80-5488

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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SUPREME COURT, U.S.

No._____

JOHN EDWARD SWINDER, Petitioner

vs.

STATE OF ARKANSAS, Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, John Edward Swindler, who is now held in the Arkansas Department of Correction, death row, asks leave to file the attached motion, and a subsequent petition for Writ of Certiorari to the Supreme Court of Arkansas without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner's affidavit in support of this motion is attached hereto.

John Edward Swindler

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LESSENBERRY & CARPENTER
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Little Rock, Arkansas 72201
(501) 372-4040

and

CHARLES L. CARPENTER, JR.
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Counsel for Petitioner

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STATE OF ARKANSAS, Respondent

AFFIDAVIT

I, John Edward Swindler, being first duly sworn according to law, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

ANSWER: No.

(If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer; if the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received).

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form or rent payments, interest, dividends, or other source?

ANSWER: No.

(If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months).

3. Do you own any cash or checking or savings account?

ANSWER: No.

(If the answer is yes, state the total value of the items owned).

_____.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furniture and clothing)?

ANSWER: NO.

(If the answer is yes, described the property and state its approximate value).

_____.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

John Edward Swindler
John Edward Swindler

SUBSCRIBED AND SWORN TO before me this 26th day of August, 1980.

(STATE OF ARKANSAS
(
(COUNTY OF LINCOLN

My commission expires:

My Commission Expires 9/6/82

Notary Jesse Dillon

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JOHN EDWARD SWINDLER.....Petitioner

v.

STATE OF ARKANSAS.....Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ARKANSAS

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September 30, 1980

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v.

STATE OF ARKANSAS.....Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

The petitioner, John Edward Swindler, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceeding on December 17, 1979.

OPINION BELOW

The opinion of the Supreme Court of Arkansas, not yet officially reported, appears in the Appendix hereto. The unofficial citation for this opinion is Swindler v. State, 267 Ark.AR 418, 592 S.W.2d 91 (1979).

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on December 17, 1979, affirming petitioner's conviction of October 26, 1978.[1] Petitioner was then without counsel until August 6, 1980. By special order of Associate Justice Harry A. Blackmun, sitting as Circuit Justice for the Eighth Circuit, petitioner was granted an extension of time to file

this petition to October 1, 1980, without prejudice to the Court to later consider the timeliness of the petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Petitioner contends that the death penalty rendered against him was done so in violation of his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Further, petitioner alleges that the deprivation of these constitutional rights has not been redressed by the Supreme Court of Arkansas.

Although the petition may be considered untimely, this is not a jurisdictional matter in a criminal case. The Court has permitted the filing of late petitions in capital cases where, unlike this case, no request for an extension of time has been made, or no extenuating circumstances have been pointed out to the Court. Arnold v. North Carolina, 376 U.S. 773 (1964). The Court has more specifically ruled that a time limitation is not jurisdictional and does not bar the Court from entertaining a petition if it so desires. Taglianetti v. United States, 394 U.S. 316 n.1 (1969).

Under Arkansas law, the obligation of counsel to pursue appellate relief ends once the matter has been appealed to the Supreme Court of Arkansas. Rule 36.26, A.R.Crim.P. (Repl. 1977). Thus, in a capital case, unless counsel is willing, or unless a death row prisoner can obtain private counsel, there is no guarantee that counsel will be available to pursue a petitioner's right to seek certiorari within the time limitations of Rule 20, Rules of the Supreme Court (1980). Petitioner has fully set out the reasons for this delay in the motion to Justice Blackmun, a copy of which is attached to this petition.

## QUESTIONS PRESENTED

I. WHETHER PETITIONER WAS SENTENCED TO DEATH BY A JURY CHOSEN IN VIOLATION OF THE CONSTITUTIONAL STANDARDS PROVIDED IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968)?

II. WHETHER PETITIONER WAS SENTENCED TO DEATH IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT GUARANTEES TO DUE PROCESS BECAUSE HE WAS DENIED TO OPPORTUNITY TO PRESENT MITIGATION EVIDENCE WHEN THE TRIAL COURT DENIED A CONTINUANCE NECESSITATED BY THE COURT HAVING EARLIER INTERRUPTED THE TRIAL FOR THE CONVENIENCE OF A JUROR?

III. WHETHER PETITIONER WAS DENIED HIS RIGHT TO TRIAL BY A FAIR, IMPARTIAL AND INDIFFERENT JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENT PROHIBITION OF BEING TRIED BY JURORS EXPRESSING OPINIONS THAT PETITIONER WAS GUILTY, EVEN BEFORE THE TRIAL BEGAN?

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Six

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...; to have compulsory process for obtaining witnesses in his favor....

United States Constitution, Amendment Eight

> ...nor cruel and unusual punishments inflicted.

United States Constitution, Amendment Fourteen

> §1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

John Edward Swindler [hereafter petitioner] was charged with having killed a police officer in the line of duty in violation of Ark.Stat.Ann. § 41-1501(b)(Repl. 1977). He was first tried in the Sebastion Circuit Court, found guilty, and sentenced to death by electrocution. See Swindler v. State, 264 Ark. 107, 569 S.W.2d 120 (1978). The Supreme Court of Arkansas reversed the first guilty verdict and death penalty because of the extensive, prejudicial pre-trial publicity that the case received.

On retrial, venue was changed from the Sebastion Circuit Court to the Scott Circuit Court--an adjoining county just a few miles from the scene of the first trial. On October 16, 1978, jury selection began and did not end until October 20, 1978. During the course of four days, 120 potential jurors were questioned about their qualifications to serve. Seventy-nine veniremen were excluded for cause because they had formed pre-conceived notions of petitioner's guilt, or the penalty that he should receive. At least four jurors were seated that expressed opinions that petitioner was guilty, but the trial court denied petitioner's motion to have them excluded for cause. Other potential jurors that expressed opinions as to guilt were excused by petitioner's use of his peremptory challenges. Petitioner exhausted his peremptory challenges before jury selection concluded.

Four jurors were excluded because of their opposition to the death penalty. Of these four, at least one expressed only general objections to the death penalty, and could not state that he was irrevocably opposed to the imposition of the death penalty in any case.

The trial lasted until October 26, 1978. Prior to the beginning of trial, petitioner was granted permission to bring in a special witness for the penalty phase of the trial. This

witness could not, however, appear in court on the date of the penalty phase. This was due, in part, to the fact that the trial had been delayed when the court permitted a continuance in the middle of the trial for the convenience of a juror. This delay was permitted despite the fact the court had chosen an alternate juror.

As a result of the above mentioned facts, petitioner was forced to trial with a jury chosen in violation of the standards enunciated by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), and Davis v. Georgia, 429 U.S. 122 (1976). Further, petitioner was not afforded trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Finally, petitioner was denied due process of law during the penalty phase of the trial. See Gardner v. Florida, 430 U.S. 349 (1977) and Lockett v. Ohio, 438 U.S. 586 (1978). For these reasons this Court should grant the petitioner for writ of certiorari, and either reverse the conviction that petitioner received, or, in the alternative, vacate the death penalty that was unconstitutionally imposed.

## REASONS FOR GRANTING THE WRIT

### I. PETITIONER WAS SENTENCED TO DEATH BY A JURY CHOSEN IN VIOLATION OF THE CONSTITUTIONAL STANDARDS PROVIDED IN WITHERSPOON v. ILLINOIS, 391 U.S. 510 (1968)

Petitioner was sentenced to death by electrocution in accordance with Arkansas law. Ark.Stat.Ann. §§ 41-1301, et seq; 1501(3) (Repl. 1977). At least one juror was excluded

after voicing only general objections to the death penalty. It is well settled law that a death penalty cannot be carried out if veniremen are excluded from the jury because of conscientious or general objections to the death penalty. Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). This principle is true if even a single juror is improperly excluded under Witherspoon. Davis v. Georgia, 429 U.S. 122, 123 (1976). Before a juror can be successfully challenged for cause under the Witherspoon rationale, the juror must state that s/he is irrevocably committed to vote against the death penalty in any case regardless of what the facts of circumstances might prove to be. Davis v. Georgia, supra.

In petitioner's case, four jurors were excluded because they voiced objections to the death penalty.[1] One juror, Murl Carmack, expressed only general objections to the death penalty. [The full voir dire of Mr. Carmack on this issue is set out in the Appendix]. His exclusion for cause from jury service was unconstitutional.

It is noted that after several statements expressing a general objection to the death penalty [R. 1446-1447], Carmack was forced to try and give a definite answer. He stated that in that case, he would not vote for the death penalty. [R. 1447] However, he then stated that he did not believe that he could vote for the death penalty and maintain a clear conscience. [R. 1447] After further questioning by the trial court, Carmack stated that he had conscientious objections to the death penalty and would not consider imposing it. [R. 1448] When asked if this applied to any case, Carmack responded only that he did not believe he could vote for the death penalty. [R. 1448] The trial

court then dismissed Carmack for cause. [R. 1448] This last answer, especially in light of the other answers on this issue, was insufficient to warrant a challenge for cause under the Witherspoon doctrine. Because of prior decisions of this Court, this matter takes on constitutional dimensions and warrants the vacating of this death penalty.

The Court has vacated a number of death penalties because of answers such as those of Carmack. Ladetto v. Massachusetts, 403 U.S. 947 (1971), [reversing Ladetto v. Commonwealth, 356 Mass. 541, 254 N.E.2d 415 (1969), where the juror stated, "I don't believe in the death punishment."]; Turner v. Texas, 403 U.S. 947 (1971), [reversing Turner v. State, 462 U.S. 9 (Tex.Cr.App. 1969), where the juror stated, "I just don't believe in the death penalty."]; Sequera v. Patterson, 403 U.S. 946 (1971) [reversing 402 F.2d 249 (10th Cir. 1971), where the juror stated, "I don't think I can bring in the death penalty."]

All the juror did in this case was express general objections to the death penalty, and state that he did not believe he could bring in the death penalty in any case. He never said that he was irrevocably opposed to the imposition of the death penalty regardless of the evidence adduced at trial.

The State had not exhausted all of its peremptory challenges at this point. However, this fact does not save the jury from being deemed chosen in violation of Witherspoon. See Mathis v. New Jersey, 403 U.S. 496 (1971) [reversing State v. Mathis, 52 N.J. 238, 245 A.2d 20 (1969).]

Despite the expressed satisfaction of the Supreme Court of Arkansas that Carmack was irrevocably opposed to the death

penalty, Swindler²v. State, 592 S.W.2d at 97, this ruling is in conflict with the decision of this Court. This Court has held it is a matter of constitutional proportions to excuse a juror who does not unequivocably state the he would refuse to vote for the death penalty in any case. Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970). Because this standard was not applied properly in this case, this Court should grant certiorari, review the voir dire examination, and then enter an order vacating the death penalty, and remanding the cause for further consideration. Davis v. Georgia, supra, 429 U.S. at 123.

II. PETITIONER WAS SENTENCED TO DEATH IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT GUARANTEES TO DUE PROCESS BECAUSE HE WAS DENIED THE OPPORTUNITY TO PRESENT MITIGATION EVIDENCE WHEN THE TRIAL COURT DENIED A CONTINUANCE NECESSITATED BY THE COURT HAVING EARLIER INTERRUPTED THE TRIAL FOR THE CONVENIENCE OF A JUROR.

Petitioner was tried for capital murder beginning on October 16, 1978, and found guilty on October 26, 1978. The penalty phase of the trial began on the same day, and petitioner was sentenced to death by electrocution. Prior to beginning the penalty phase, petitioner moved for a continuance of just five days to obtain the presence of a mitigation witness. This continuance was necessitated by the fact that the trial had been interrupted for the convenience of a juror, and had run past the time the mitigation witness could be available. Failure to grant the continuance denied petitioner his Due Process rights at the sentencing phase and amounted to an arbitrary and capricious abuse of discretion by the trial court.

Sentencing is a critical phase of the trial process in a capital case.

> It is...clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process clause....Gardner v. Florida, supra, 430 U.S. at 358.

Further

> To meet constitutional requirements, a death penalty must not preclude consideration of relevant mitigating factors. Lockett v. Ohio, supra, 438 U.S. at 608.

In order for petitioner to be properly sentenced, he must be given the opportunity to present matters in mitigation of the offense. The Arkansas statute limits the consideration of aggravating circumstances to seven specificed factors. See Ark.Stat.Ann. § 41-1303 (Repl. 1977). With regard to mitigation, however, the statute specifically does not limit the matters that can be presented.

> Mitigating circumstances shall include, but are not limited to the following: [the statute then lists six specific factors] Ark.Stat.Ann. § 41-1304 (Repl. 1977) [Emphasis added] [Explanation added]

Clearly, the potential for rehabilitation of the petitioner was a mitigating factor the jury should have been permitted to consider in determining whether a death penalty was appropriate.

> Indeed, the extinction of all possibility of rehabilitation is one of the aspects of the death sentence that makes it different in kind from any other sentence a State may legitimately impose. Gardner v. Florida, supra, 430 U.S. at 360.

It is violative of Due Process not to permit the sentencing authority to consider the rehabilitation factor. The time spent in ascertaining this fact is well spent if it means the difference between life and death. See Gardner v. Florida, supra, 430 U.S. at 360.

During the pre-trial proceedings, petitioner moved for funds to bring a witness, Mr. Don Reid, Jr., from Texas to Arkansas to testify in mitigation. [R. 298-299; 666-669] A transcript of Reid's testimony in aonther capital case was offered in support of the motion, showing that Reid would testify about electrocution as a means of punishment and about the rehabilitation of persons serving life sentences. [R. 641-659] The motion was granted. [R. 1831]

Jury selection, including selection of an alternate juror, began on October 16, 1978 and was completed on October 20. Testimony was scheduled to begin on Monday, October 23, 1978. The jury was not sequested. [R. 1267] Testimony did not begin until Tuesday, October 24, because of a death in the family of one of the jurors. [R. 1409; 2184] Reid could have been present through October 25--the day on which he would have testified but for the delay. Because of the delay, petitioner offered to enter a deposition before the jury or, alternately, requested a continuance until October 31. The prosecution objected to the deposition because of the lack of an opportunity to cross examine Reid. The trial court denied the continuance, holding that testimony about electrocution was not relevant. [R. 1283-1285]. The trial court did not address the matters relating to rehabilitation that Reid would have presented.

The Supreme Court of Arkansas affirmed, but also failed to address the expected testimony as it related to rehabilitation.

> This argument is misplaced because whether death by electrocution is cruel and unusual punishment is a question of law and not of fact; nor is it a circumstance to be considered when a jury deliberates on mitigating circumstances. Swindler v. State, 592 S.W.2d at 98.

This Court has consistently held it to be violative of Due Process standards applicable in capital cases to omit rehabilitation evidence as a mitigating factor. Gardner, supra, 430 U.S. at 360; Lockett, supra, 438 U.S. at 620 (concurring opinion of Mr. Justice Marshall). Rehabilitation prospects for petitioner specifically, and persons serving life sentences generally, was certainly relevant under the Due Process clause, and under the Arkansas statute. Information regarding the nature of electrocution is relevant under the statute, and the Due Process clause, in helping the jury determine whether evolving standards of decency in the community, where the cause was heard, require death by electrocution for the petitioner.

The information relating to rehabilitation and electrocution was of critical importance to the jury in reaching a decision on penalty because, under Arkansas law, the jury imposes a sentence of life imprisonment without parole if it finds that aggravating circumstances do not outweigh mitigating circumstances beyond a reasonable doubt; or, that aggravating circumstances do not justify beyond a reasonable doubt imposition of the death penalty. Ark.Stat.Ann. § 41-1302 (2)(Repl. 1977). Without the opportunity for the jury to have heard this evidence, there is no reliable certainty that the jury sentence represented contemporary community standards.

Due Process required the brief delay in this matter of critical importance when it may had made the difference

between life and death. This is not a situation where the matter can be left to the discretion of the trial court, particularly when the delay was caused in part by a delay in the trial because of a juror's absence. The jurors were under no hardship since they were not sequested. There was no lack of diligence on the part of defense counsel [R. 1285]. The prosecution refused the alternative of submitting a deposition.

Under these circumstances, the brief delay of five days is not significant when the time invested in determining the facts presented could have made the difference bewteen life and death.

Petitioner's Due Process rights have been denied and he has been subjected to the death penalty under aribtrary and capricious circumstances. Gardner, supra; Woodson v. North Carolina, 428 U.S. 280 (1976). This Court should grant the petition for writ of certiorari under these circumstances, review the record, and reverse and remand the decision as to penalty as being unreliable.

## III. PETITIONER WAS DENIED HIS RIGHT TO TRIAL BY A FAIR, IMPARTIAL, INDIFFERENT JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENT PROHIBITION OF BEING TRIED BY JURORS EXPRESSING OPINIONS THAT PETITIONER WAS GUILTY, EVEN BEFORE THE TRIAL BEGAN.

Petitioner's original conviction and sentence were reversed because the prejudicial nature of extensive pretrial publicity made it impossible for him to get a fair trial. Swindler v State, 264 Ark. 107, 569 S.W.2d 120 (1978). Prior to the second trial, a change of venue was made to an adjoining county. Petitioner moved on several occasions that the second

trial court declare and mistrial and change venue a second time. The key issue is that the trial court failed to excuse biased jurors for cause after those jurors had expressed opinions that the petitioner was guilty of the offense charged.

On appeal to the Supreme Court of Arkansas, the question was specifically raised as to three jurors. The Court noted in its opinion that these three jurors had more knowledge than other potential jurors questioned, but also pointed out that they were seated while the petitioner had peremptory challenges remaining. The Court concluded that it could not say that the trial court had clearly abused its discretion. Swindler v. State, supra, 592 S.W.2d at 95.

Although the voir dire of these three jurors is set out in detail in the Appendix, some of the answers given should be reviewed here.

Thurman Jones stated that the only opinion he could have was that the petitioner was guilty since another jury had found him guilty. [R. 1147] He stated that he would try to base his verdict on the evidence in the courtroom, but later qualified this statement by saying

> ...I would accept it more [the presumption of innocence] if he had not been tried. The only thing I am wondering about now, since he has had a trial, and I know about it, I am wondering if he is not going to have to prove to me that he is innocent. [R. 1149][Explanation added]

Jones stated he hoped that he could put aside the other information he knew [R. 1150], and that he could be a fair juror. On later questioning, he said that he knew that petitioner was accused of having killed a policeman, was caught "in the bottoms," and had undergone a sanity evaluation. [R. 1153] He aslo knew that petitioner was accused of having killed two

other people. In direct response to another question about the presumption of innocence, Jones staed that he could not give petitioner the same presumption he could have prior to the first conviction. [R. 1156]

Jones commented that he did not think he would consider anything that he had heard [R. 1158], and promised to do the best he could from letting this information creep into his mind during the course of the trial. He finally stated that he would not consider anything except the evidence in court. [R. 1163] After the trial court denied a challenge for cause, Jones was seated as a juror. [R. 1163-1164]

Milton Skagg was seated as a juror. He stated that he did not want to dispute the news that had come out on the case [R.1122] and because of the prior conviction, he did not know how he could avoid having an opinion. [R. 1223] He promised to try and put aside what he had heard [R. 1224], but later pointed out that petitioner would have to prove his innocence. [R. 1127] Skagg stated that he would follow the law as to the presumption of innocence [R. 1228-1230].

When asked what facts he knew, Skagg stated he knew a policeman had been shot, and that petitioner was apprehended as the person who committed the offense. [R. 1231-1232] He acknowledged that he heard two other persons had been killed by petitioner [R. 1233] Skagg admitted that he had a little bit of an opinion, based upon what he had heard, that petitioner was guilty. [R. 1235] He stated that he would drop his opinion and try to listen to only the facts in the case. [R. 1238]

Harry Sunderman was the third juror seated that had knowledge of the offense. Sunderman stated that he remembered the offense occurred at a service station, and remembered the names of John Swindler (petitioner), and Randy Basnett (the victim). [R. 975] He knew petitioner was from the Carolinas, and that charges were pending against him there. [R. 977] He stated that people he had discussed the case with were convinced that petitioner was guilty [R. 978]. Sunderman admitted that after the first trial he was convinced that petitioner was guilty [R. 978], but that he would listen to all of the evidence in this case. He later admitted, however, that because of the first trial, he felt that the petitioner "may well be guilty." [R. 979] Although he stated that he could not assure that he would not compare the evidence of the two trials [R. 981], the trial court overruled a challenge for cause [R. 985].

It is well settled law that a criminal defendant is entitled to trial by an impartial and indifferent jury. Anything less violates even the most minimal standards of Due Process. In re Oliver, 333 U.S. 257 (19 ). Statements that indicate impartiality may be suspect if the general atmosphere of the trial suggests that the community is inflamed against the defendant. Murphy v. Florida, 421 U.S. 794, 802 (1975). The care that should have been taken in excusing biased jurors is not consistently present in this case.

A complete examination of the voir dire displays a basic inconsistency by the trial court in trying to assure that petitioner received a fair trial. In some instances, the trial court went to great lengths to determine a potential juror's qualifications. But several jurors were allowed to remain, forcing petitioner to exercise precious peremptory challenges, when they should have been removed by the trial

court. Over 80% of the jurors excused for cause in this matter stated that they had fixed opinions as to petitioners guilt. The failure of the trial court to consistently question these other jurors is in direct conflict with the mandate of the Supreme Court of Arkansas.

> We agree with the State that the question of a juror's qualifications rests within the sound discretion of the trial court and that the proper test is whether the prospective juror can lay aside his impression or opinion and render a verdict based upon the evidence presented in court. However, where the juror testifies that he is not one hundred percent sure that he can lay aside his previous impressions or opinions, we do not see how any discretion on the part of the court can add any assurance that the verdict will be rendered only upon the evidence presented in court. Swindler v. State, supra, 264 Ark. at 114.

Even this Court has questioned protestations of impartiality when most of the other veniremen had admitted to a disqualifying prejudice. Murphy v. Florida, 421 U.S. at 803.

Petitioner should never had been forced to use a peremptory challenge to excuse a disqualified juror. To cite but one example, the Court should review the voir dire examination of Thomas Bricksey in the Appendix. [R. 1291-1318]

Bricksey admitted that he felt petitioner was guilty and that it would be hard for him to set aside that opinion, despite his desire to be impartial. [R. 1303] He reitterated that he felt petitioner was guilty, even after questioning by the trial court on the presumption of innocence. [R. 1306] Although he could accept that in the eyes of the law petitioner was innocent, Bricksey did not think he was innocent. [R. 1308] Despite all of these answers, Bricksey declared that he could reach a verdict based only upon the evidence. [R. 1311] In all fairness, however, it cannot be said that he was sure he could try the case only upon the evidence produced at trial.

Petitioner should not have been forced to use a peremptory challenge in such a situation. This practice serves to virtually deny petitioner any peremptory challenges. Of course, petitioner did not have any peremptory challenges remaining at the end of voir dire. The effect of this situation is that it frees the trial court from being scrupulously fair in its rulings on challenges for cause. Further, the fact that the trial court made some correct rulings, but not others, does not overcome this error.

The sanctity of trial by an impartial jury has been guaranteed repeatedly by this Court. Murphy v. Florida, supra; Groppi v. Wisconsin, 400 U.S. 505 (1971); Parker v. Gladden, 385 U.S. 363 (1966); Sheppard v. Maxwell, 384 U.S. 16 (1966); Turner v. Louisiana, 379 U.S. 466 (1965); Irvin v. Dowd, 366 U.S. 717 (1961). In all of these cases, this Court has for various reasons carefully considered the entire record to determine if there was a basis for a claim or prejudice or bias. In all of those cases, the Court has declared that the trial court has a special duty to assure that the jury is impartial and indifferent. The trial court, and the Supreme Court of Arkansas on appeal, did not fulfill that special duty.

Petitioner was denied his constitutional right to trial by an impartial jury, and forced to use peremptory challenges to fulfill an obligation of the trial court to assure that biased jurors are not seated. Of course, as pointed out above, having exhausted his peremptory challenges, petitioner was forced to be tried by persons that thought he was guilty even before hearing one piece of evidence.

Petitioner has been denied his right to trial by a fair, impartial and indifferent jury. This Court should grant this

petition for writ of certiorari, review the record, and determine if, consistent with principles of Due Process, the burden can be placed upon the defendant in a criminal trial, to assure that a juror is impartial by using peremptory challenges to fulfill an obligation of the trial court.

For the foregoing reasons, this Court should grant this petition for writ of certiorari to the Supreme Court of Arkansas and consider the points raised by petitioner. The Court should either reverse and remand the case for new trial, or, in the alternative, declare that the death penalty imposed is improper and vacate that sentence.

Respectfully submitted,

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IN BANC

# SUPREME COURT OF ARKANSAS

No. CR 79-116

JOHN EDWARD SWINDLER,
Appellant,

V.

STATE OF ARKANSAS,
Appellee.

Opinion Delivered DEC 17 1979

An Appeal from Scott County Circuit Court; David Partain, Judge.

Affirmed.

DARRELL HICKMAN, *Associate Justice*

John Edward Swindler's first trial for killing Randy Basnett, a Fort Smith police officer acting in the line of duty, was held in February, 1977. He was found guilty of capital murder and sentenced to die by electrocution. His trial was held in Fort Smith, Sebastian County. We reversed that conviction because the court failed to grant a change of venue and because the court failed to excuse three jurors. Swindler v. State, 264 Ark. 107, 569 S.W.2d 120 (1978). The case was tried again but this time in Scott County, an adjacent county to the the judicial district. Swindler was convicted the second time of capital murder and received the same sentence. This is an appeal from that conviction.

The shooting occurred when Swindler stopped off at Fort Smith, Arkansas apparently enroute to Kansas City from South Carolina. He pulled into the Road Runner Service Station just off Interstate 540, which bypasses downtown Fort Smith. It was about 5:00 p.m., Friday afternoon, September 2, 1976.

Basnett, a Fort Smith policeman who was on duty, had stopped to drink a coke with Carl Tinder at the Road Runner Service Station. Tinder ran the service station, which included a small convenience store. Basnett had in the past dropped by from time to time to drink coffee or a coke with Tinder. As they were talking at the counter, inside the station-store, Swindler drove up and parked his vehicle in the middle lane of three lanes under the station canopy. His vehicle was headed east, the driver's side facing the front of the station-store. Swindler went in and asked for directions to Kansas City. Basnett and Tinder told him how to proceed.

Swindler went back outside, raised the hood on his vehicle and was looking after the vehicle when Basnett left the station-store. Basnett got in his police vehicle, which was parked nearby, and drove around to the other side of the station, parking his vehicle to the rear of Swindler's. Apparently Basnett made a radio call and then walked up to Swindler.

Two witnesses testified that Swindler shot and killed Basnett as the officer stood at the car door on the driver's side. Basnett had not pulled his gun until after he was shot. Tinder was one of these eyewitnesses; he was inside the store; the other witness was a man named Steve Cardwell who said he was outside the station.

Basnett was able to fire five or six times through the car door before he died. Basnett fell back, fatally wounded. Swindler, although he was injured, was able to drive off. He was arrested shortly thereafter. The State Police District Headquarters was just across the street from the station.

Four guns and a rifle scope, as well as some ammunition, were found near the vehicle: a .38 Colt revolver, a .38 Smith and Wesson revolver, a 9 shot .22 automatic pistol, all fully loaded, and a .22 caliber rifle containing three live rounds. Over 200 rounds of live ammunition for the rifle were found in or near the vehicle. This evidence was introduced over Swindler's objections.

Swindler's version as to the actual shooting differed. He said he saw the policeman get in his car and thought he was leaving. Swindler went back to seeing after his car and had just gotten into it when he heard a "cock," as a hammer being cocked on a pistol, heard something said to the effect, "damn hippie," and was shot. He said he had a pistol in his belt and another in his pocket and, just as he was laying down the pistol he had taken from his belt, this happened; he turned instinctively and the gun went off. He said he did not know it was a policeman until after he fired. He claimed he was shot first.

He remembered seeing Tinder inside the station-store. He recalled after the shooting
/seeing some children about on bicycles. He did not recall seeing the other eyewitness, Cardwell.

The first trial was preceded by news coverage of the killing, of the funeral of the police officer, and of Swindler's past. The coverage was substantial. In some instances the stories contained material that could and, in fact did, result in prejudice to Swindler's right to a fair trial at that time in Sebastian County. The extent of that coverage was discussed at length in our opinion deciding the first appeal. Chief Justice Carleton Harris, in a concurring opinion,

especially addressed the problem created by the news coverage of the killing and its relation to Swindler's first trial.

Although the appellant in this case argues some of the same issues regarding a prejudiced community and jury, there is no evidence at all in this record of unfavorable pretrial publicity. The record we have regarding those arguments consists solely of the voir dire examination of veniremen (prospective jurors) from Scott County.

We have examined the record not only as to those allegations of error raised on appeal but also other errors as we do in such cases. Rules of Crim. Proc., Rule 36.24. We find no prejudicial error was committed and affirm the judgment and sentence of the trial court.

The first three arguments of error are related and will be discussed together.

I.

> The trial court erred in denying the defendant's motions for a mistrial and motions for a second change of venue when it was shown during voir dire of the jury that a fair and impartial jury could not be selected to try this case.

II.

> The trial court erred in overruling the defendant's motions to declare Arkansas' venue statutes (Ark. Stat. Ann. Sections 43-1507 and 1518) which permits only one change of venue and Article 2, Section 10 of the Arkansas Constitution which permits a change of venue only to another county in the judicial circuit unconstitutional in violation of the fair trial and due process clauses of the United States Constitution and in refusing to change the venue the second time to a county where the defendant can receive a fair and impartial trial.

III.

The trial court erred in refusing to grant the defendant's motion to excuse jurors for cause (either as a group or singly) and requiring the defendant to exhaust his preemptory challenges to excuse them and to take several jurors who should have been excused for trial.

The United States and Arkansas constitutions entitle a defendant to a fair trial. If, because of pretrial publicity, an impartial jury cannot be seated to try a defendant, his right to a fair trial is violated. Irvin v. Dowd, 366 U.S. 717 (1961); Swindler v. State, supra; Ruiz & Van Denton v. State, 265 Ark. 875, 582 S.W.2d 341 (1979).

Swindler's first argument is that, in Scott County, he could not be tried by an impartial jury.

While Swindler's counsel moved six times for a mistrial or change of venue during the 5 days' voir dire examination, no evidence at all was offered of pretrial publicity. No affidavits or testimony, showing pretrial publicity or ill feelings in the community as a result of the killing, was offered, as they had been in Swindler v. State, supra or Ruiz & Van Denton v. State, supra.

Our law provides affidavits or sworn testimony must be offered to support a motion for a change of venue. Ark. Stat. Ann. §43-1502.

The only evidence we have of prejudicial pretrial publicity is the voir dire testimony of the prospective jurors as 120 jurors were examined. Swindler had not exhausted his peremptory challenges until after the 11th juror had been selected.

The trial court, no doubt mindful of our decision in the first Swindler case, was careful and took pains in selecting this jury.

The fact 120 were examined is not, standing alone, enough to conclude a fair and impartial panel could not be seated.

The judge excluded over 79 people for cause. The jurors seated, while in some instances acknowledging that they knew generally of the crime, Swindler, or the first trial, all said they could set aside what they had heard and try Swindler on the facts and according to the law.

The test of whether pretrial publicity has prejudiced a juror was set forth in Irvin v. Dowd, supra. It reads:

> It is not required that the jurors be totally ignorant of the facts involved ... To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented at court. 366 U.S. at ~~719~~ ..722-723

Deciding to seat a juror challenged for bias is a discretionary matter with the trial judge. To reject a potential juror, the judge must be satisfied that the juror's state of mind is such that he cannot render an impartial judgment and that seating him will result in substantial prejudice to the rights of the defendant. Jones v. State, 264 Ark. 935, 576 S.W.2d 198 (1979).

Swindler's attorney did not move to strike 9 of the jurors selected. One was overseas at the time of the killing; another had read or heard nothing of the case, except from her husband; one knew nothing of the facts but only vaguely recalled "something' about it; another had read,some three weeks before this trial, the local paper

in Scott County about the killing; one recalled some news accounts and probably decided Swindler was guilty because he had been found guilty before; one had seen a "little bit" on T.V. and read in the local paper that a Fort Smith policeman was shot. Another had heard nothing and knew nothing. All of these were selected with no objection. The last juror selected, who knew nothing, was selected after the defense had exercised all the peremptory challenges.

The three jurors selected, that the defense challenged for cause, were all selected when the defense had remaining a peremptory challenge. These three did admit to having more knowledge than the others.

Thurman Jones had read the Fort Smith newspapers and seen the "case on T.V." He also read that Swindler was accused of killing two others in South Carolina. He had assumed Swindler was guilty since he had been convicted. Jones was questioned extensively. He acknowledged he could set aside all his ideas and information and give Swindler a fair trial.

Milton Staggs had read and heard some about the case and had formed a "little bit" of an opinion. He said he would have no difficulty in setting aside any information or opinion he had formed.

Henry Sunderman had read and heard of the case. He declared he had no opinion about the case. Since a jury had convicted Swindler before, he had to conclude Swindler might well be guilty. But he said he could do his duty in this case and disregard any information he had about the case.

The judge, in his discretion, decided these jurors could serve.

We cannot say the judge clearly abused his discretion in selecting these jurors.

There is no comparison at all between this case and the first Swindler case and the Ruiz & Van Denton case. The appellant cites as controlling the cases of Irvin v. Dowd, supra, and Sheppard v. Maxwell, 384 U.S. 333 (1966), the case involving Dr. Sam Sheppard. In both Irvin and Sheppard there was strong evidence of pretrial publicity that prevented the selection of a fair jury. As we indicated there was no such evidence offered in this case. The only real argument the appellant has is that over 80% of those questioned were excused for cause.

We have independently examined the voir dire, as we are required to do in such cases. We find that the facts in Swindler's second trial regarding the composition of the jury are not unlike those that were found to exist in the case of Murphy v. Florida, 421 U.S. 794 (1975). In the Murphy case the Court also found that a considerable number of jurors knew of Murphy's crimes and his past crimes. However, the Court did not find that such information alone required a reversal of Murphy's conviction. The Court compared the difference between Murphy's case and that of Irvin v. Dowd, supra. The Court stated:

> The voir dire in this case [Murphy's] indicates no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside. ...

Applying the tests we have recited, we must conclude that the appellant has not demonstrated such prejudice in the community nor bias on the part of any juror that would require a new trial.

The second argument is meritless. The Arkansas law permitting only one change of venue, and that to a county within the judicial circuit, is not on its face unconstitutional. The case of Irvin v. Dowd,

supra, does not support appellant's argument. The Court in Irvin ordered a trial in another county, contra to state law, because the trial judge refused a change of venue simply because state law forbade it.[1] Also, the record in the Irvin case, like that in Swindler and Ruiz & Van Denton, was replete with evidence of pretrial publicity and a change of venue was obviously necessary.

It is not necessary for us to decide whether these venue laws can result in a denial of a right to a fair trial and due process of law. The question is, could Swindler receive a fair trial, by an impartial jury, in Scott County? We conclude he could.

The third argument has no merit. The single fact that over 80% of the jurors questioned were excused for cause is not sufficient to find that a mistrial should have been granted or change of venue ordered. That is only one consideration. The judge and lawyers spent 5 days selecting a jury. Except for the three jurors objected to, it can hardly be argued the jury was unacceptable. The fact the defense had to use its preemptory challenges (as did the State) is no reason to find a jury could not be seated.

IV.

> The trial court erred in denying the defendant's motion in limine to prohibit the questions of the veniremen on voir dire about their feelings concerning the death penalty.

V.

> The trial court erred in excusing for cause any or all of the four veniremen who expressed opposition to the imposition of the death penalty.

---

1 The Court noted in Irvin that the state supreme court had held that the Indiana statute could be circumvented if a defendant could not get a fair trial on one change of venue. Irvin v. Dowd, supra, at 721.

These two points were argued as one by the appellant.

The appellant filed a motion in limine, which was denied, asking that the State not be allowed to ask prospective jurors whether they opposed the death penalty. Without citing any authority, it is argued that such a procedure denies a defendant a jury composed of a cross-section of the community and, therefore, violates the fair trial and due process requirements of the United States and Arkansas constitutions. This argument does not have any merit as we will explain in our answer to the fifth assignment of error.

The fifth allegation of error is that four prospective jurors were improperly excused because they expressed opposition to the death penalty. In the case of Witherspoon v. Illinois, 391 U.S. 510 (1968), the practice of permitting a prosecuting attorney to qualify a jury for the death penalty was not prohibited; what was prohibited by Witherspoon is the exclusion of a juror who is not irrevocably opposed to the death penalty.

Of the four prospective jurors excluded by the court on the motion of the State, three of them stated without equivocation that they opposed the death penalty under any circumstances. The other witness did make a statement at one point that he did not believe "he could impose the death penalty." That witness, Murl Carmack, testified as follows:

> Q. Let me ask you this. Do you think the death penalty is proper punishment for some crimes?
>
> A. I wouldn't think so.

Q. Do you believe in the death penalty?

A. Not so much.

Q. Do you understand that under the law of Arkansas that it is the jury that finds whether a person is guilty or not guilty, and then if the jury finds the defendant guilty then the jury actually sets the punishment, that is not done by the Judge. Now, if you were on this jury, and you listened to all the evidence, could you, under any circumstances, vote for the death penalty?

A. I wouldn't want to.

Q. I understand you might not want to, but you know it is the law of Arkansas, and if you listened to the evidence and you found that under our law this was a proper case for the death penalty, then could you follow Arkansas law, or would you stick to your own personal feelings?

A. Well, now I would stick to what I believe in.

Q. So are you telling me that no matter what the facts are, or what the law is, that you would not vote for the death penalty?

A. No, I don't think I would.

Q. Okay, now you say you don't think you would. Can you tell me for sure that you would or would not?

A. Well, I wouldn't then, I will put it that way. [Emphasis added.]

Q. No matter what the facts were, or what the law was, you would not vote for the death penalty?

A. No, I don't believe I could, and then have a clear conscience.

THE COURT: No, what he has asked you is, and I want to ask you, too, to be sure that I understand. Is that feeling that you have or your belief so fixed and strong that regardless of what the facts might be, regardless of how bad they might be, or how aggravating they might be, in any case, that under no circumstances could you consider imposing the death penalty?

A. I wouldn't. [Emphasis added.]

THE COURT: In any case?

A. I don't believe I would.

DEFENSE ATTORNEY: I have no questions, your Honor.

THE COURT: All right, he will be excused for cause.

We are satisfied that this juror was irrevocably opposed to the death penalty and the court was not wrong in excluding the juror for that reason. See McCree v. State, 266 Ark. _____ (September 10, 1979).

VI.

> The trial court erred in overruling the defendant's motion to reduce the charge on the grounds that the Arkansas death penalty is unconstitutional.

The appellant concedes that we have consistantly ruled this point to be without merit, beginning with Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977), and in every case thereafter where the question has been raised.

VII.

> The trial court erred in denying the defendant's motion to reduce the charge on the grounds that causing the death of a police officer in the line of duty should not constitute the offense of capital murder.

The appellant concedes that we held this argument to be without merit in the first appeal. Swindler v. State, supra.

VIII.

> The trial court erred in overruling the defendant's motion to reduce the penalty on the grounds that death by electrocution is cruel and unusual punishment.

The appellant concedes that we held this argument to be without merit in the case of Ruiz & Van Denton v. State, supra.

IX.

The trial court erred in permitting in evidence any weapons other than the alleged murder weapon over the defendant's objection on relevancy grounds.

The appellant concedes that we held this argument to be without merit in the first appeal. Swindler v. State, supra.

X.

The trial court erred in permitting in evidence in rebuttal, testimony and exhibits about highway signs along Interstates 40 and 540 over the defendant's objections on relevancy grounds.

The appellant argues that the State simply called two policemen before the jury to prejudice them by showing that policemen were interested in the case so the defendant would receive the death penalty. The State argues that the testimony of the policemen regarding the signs was used to impeach Swindler's testimony that he was looking for Highway 71 to go to Kansas City. The officers' testimony indicated that there were two exits, before the exit Swindler took to the service station, which were clearly marked "Highway 71 North," thereby impeaching to some degree Swindler's testimony that he was looking for a way to reach Highway 71. We find no merit at all to the appellant's conclusion that the officers were used to prejudice the jury. Certainly we find no prejudicial error resulting from the testimony.

XI.

The trial court erred in denying the defendant's motions for a directed verdict and to reduce the charge at the close of the state's case and when both sides rested.

Essentially this argument was answered in Swindler v. State, supra. We view the evidence on appeal most favorable to the appellee.

Viewed in hat light there was substantial evidence of premeditation and deliberation. The four loaded guns were enough circumstantial evidence for the jury to conclude that he intended to use them; this, together with the two eyewitnesses' testimony is substantial evidence of the elements of the crime of capital felony murder.

XII.

> The trial court erred in denying the defendant's motion for a continuance of the sentencing stage of the trial so that the defendant could present an expert witness who was prepared to testify that the cruel nature of death by electrocution and possibility of rehabilitation are mitigating circumstances.

Whether a trial court grants or denies a continuance is a matter of discretion and we only set aside a ruling if we find the court abuses that discretion. Russell & Davis v. State, 262 Ark. 447, 559 S.W.2d 7 (1977). We find no such abuse in this case. This argument is misplaced because whether death by electrocution is cruel and unusual punishment is a question of law and not of fact; nor is it a circumstance to be considered when a jury deliberates on mitigating circumstances. It is not up to the jury to decide how a defendant dies. Death by electrocution has been decided by the General Assembly as the means of execution in such cases. Ark. Stat. Ann. §43-2611 (Repl. 1977).

XIII.

> The trial court erred in permitting in evidence over the defendant's objection State Exhibit #55 which purported to reflect that the defendant had been convicted of armed robbery and in overruling the defendant's objection to Sentencing Instruction (A) which permitted the jury to find that the defendant committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person.

We ruled this evidence admissible on the first appeal. Swindler v. State, supra.

XIV.

> The trial court erred in overruling the defendant's objection to Sentencing Instruction (B) which permitted the jury to find that the defendant in the commission of the capital murder, beyond a reasonable doubt, knowingly created a great risk of death to a person other than the victim.

We ruled against the appellant on this same issue in the first Swindler case. However, it is argued that the testimony was substantially different in this case. Swindler's attorney cross-examined in detail the witness Tinder who was inside the service station at the time of the killing. He argues that it was impossible for Swindler to have intended to create a great risk of death to other people. We disagree. The shots were fired in the direction of the station-store front. The evidence is that the officer was struck twice and that Swindler fired twice, but that does not mean that Swindler had any regard for other people in the vicinity. According to the evidence there were at least three people other than the officer in the vicinity; Tinder, Cardwell and Mrs. Cardwell. Swindler could not even swear that he only shot twice; he could not swear that he knew he shot a policeman until after it was done. Tinder was standing behind the counter inside a store front that was virtually all glass. The fact that there may have been a few gasoline pumps or stanchions between Swindler and the store front begs the question. The question is, was there sufficient evidence to support a finding that Swindler knowingly created a great risk of death

to other people. There was ample evidence Swindler had no regard for the lives of others in the vicinity. Such evidence was in Tinder's testimony, Cardwell's testimony, all those loaded guns, and even Swindler's own testimony.

XV.

> The trial court erred in permitting in evidence over the defendant's objections State's Exhibits #56 and #57 which were a computer printout message, complaint and warrant for defendant's arrest for unlawful flight to avoid prosecution and in overruling the defendant's objection to Sentencing Instruction (D) which permitted the jury to find as an aggravating circumstance that the capital murder was committed for the purpose of avoiding a lawful arrest or effecting an escape from custody.

We ruled against the appellant's argument on this issue in the first appeal. Swindler v. State, supra.

XVI.

> The death verdict was returned on the basis of passion and prejudice by the jury and when this court compares death penalty cases, the death verdict should be set aside and the defendant be sentenced to life without parole.

We find no evidence that the jury's verdict was based on passion or prejudice. We adhere to the majority opinion in Collins v. State, supra, which says that we will compare death penalty cases and that we can reduce a sentence if we find it was the result of passion and prejudice. We have reduced one death sentence to life without parole. Giles v. State, 261 Ark. 413, 549 S.W.2d 479 (1977). Comparing this killing to others that we have considered, there is hardly any room for argument that the appellant has any grounds for asking for leniency.

In conclusion, Swindler received a fair trial. Therefore, the judgment and sentence in this case are affirmed.

Affirmed.

Harris, C.J., not participating.

# Supreme Court of the United States

No. A-228

JOHN EDWARD SWINDLER,

Petitioner,

v.

ARKANSAS

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## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for petitioner(x),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 1, 1980., without prejudice to the Court's consideration of whether this application has been filed in time.

/s/ Harry A. Blackmun
Associate Justice of the Supreme Court of the United States

Dated this 9th day of September, 1980.

APPENDIX

VOIR DIRE EXAMINATION OF MURL CARMACK: [Partial transcript: (R. 1444-1448)]

BY MR. KARR:

Q. Mr. Carmack, do you know anything about this case?

A. I don't really know, no.

Q. Have you read anything about it in the newspaper?

A. No, I haven't.

Q. Have you seen stories about it on television news?

A. Yes, I have seen that.

Q. Have you heard other people talk about it?

A. Yeah.

Q. Based upon the things you have seen and heard, do you have an opinion right now as to whether the defendant is guilty or not guilty? [R. 1444]

A. Well, I cannot truthfully say either way.

Q. So right now you don't have an opinion either way about it?

A. I might have just a little bit.

Q. Well, do you think that whatever opinion you have now is so strong that you could not set it aside if you were on this jury?

A. I am afraid it would have a little bearing.

Q. If you were selected on this jury do you think you could sit there and listen to all the evidence that was presented in this courtroom and then base your decision just on what you hear in court?

A. I imagine I could.

Q. Is there any reason why you could not follow just the evidence that is presented here in court and the law that is explained to you by the Judge?

A. Not that I know of.

Q. Do you think you could give a fair trial both to the State of Arkansas and the defendant in this case if you were selected on the jury?

A. If I understood it, I would. I am kinda thick-headed.

Q. But you could understand it just as well as any other juror, couldn't you?

A. Well, there is a lot of people that are a lot smarter than I am. [R. 1445]

Q. But do you know any reason why you could not just follow the law and the evidence as it is presented here in court?

A. No. My health is pretty bad, my nerves are shot. I had to quit working.

Q. When did you have to quit working?

A. Two years ago.

Q. What did you do at the time you had to retire?

A. I was killing chickens, down here at the plant.

Q. You haven't worked since that time?

A. No, sir, nothing only just around home.

**Q. Let me ask you this. Do you think the death penalty is proper punishment for some crimes?

A. I wouldn't think so.

Q. Do you believe in the death penalty?

A. Not so much.

Q. Do you understand that under the law of Arkansas that it is the jury that finds whether a person is guilty or not guilty, and then if the jury finds the defendant guilty then the jury actually sets the punishment, that is not done by the Judge. Now, if you were on this jury, and you listened to all the evidence, could you, under any circumstances, vote for the death penalty?

A. I wouldn't want to. [R. 1446]

Q. I understand you might not want to, but you know it is the law of Arkansas, and if you listened to the evidence and you found that under our law this was a proper case for the death penalty, then could you follow Arkansas law, or would you stick to your own personal feelings?

A. Well, now I would stick to what I believe in.

Q. So you are telling me that no matter what the facts are, or what the law is, that you would not vote for the death penalty?

A. No, I don't think I would.

Q. Okay, now you say you don't think you would. Can you tell me for sure that you would or would not?

A. Well, I wouldn't then, I will put it that way.

Q. No matter what the facts wer, (sic) or what the law was, you would not vote for the death penalty?

A. No, I don't believe I could, and then have a clear conscience.

MR. KARR: I submit him for cause, Your Honor.

THE COURT: All right, Mr. Carmack, apparently what you are telling Mr. Karr is that you do oppose or have conscientious objections to the death penalty?

A. Right. [R. 1447]

THE COURT: Now, what he has asked you is, and I want to ask you, too, to be sure that I understand. Is that feeling that you have or your believe (sic) so fixed and strong that regardless of what the facts might be, regardless of how bad they might be, or how aggravating they might be, in any case, that under no circumstances could you consider imposing the death penalty?

A. I wouldn't.

THE COURT: In any case?

A. I don't believe I would.

MR. LANGSTON: I have no questions, Your Honor.

THE COURT: All right, he will be excused for cause.

MR. LANGSTON: Save our exceptions, Your Honor. [R. 1448]

that were asked of you or the answers that you gave. What we are trying to do, and I hope you will all understand this, is try to make a jury based upon the individual opinion and knowledge of each individual juror. So the Court must request that after you are examined that you do not discuss what your examination consisted of while you were here. We are going to move along in just a few moments, and we will try to move along as rapidly as we can. So thank you very much, and I felt it was necessary to tell you that since I had overlooked it before. All right, let's call the first juror, please.

VOIR DIRE EXAMINATION OF HENRY SUNDERMAN

BY MR. KARR:

Q. Mr. Sunderman, do you know anything at all about the facts of this case?

A. Only what I have read in the newspaper and TV.

Q. Have you read quite a bit and seen quite a bit on TV about it?

A. Some little bit, yes.

Q. From what you have read and seen, do you have any opinion as to how the case should be decided?

A. No, I don't.

Q. Have you ever served on a jury before?

A. Yes.

Q. When was that?

A. This would be approximately, oh, 1972.

Q. Was that here in Scott County?

A. No, it was in Polk County.

Q. What kind of jury did you serve on? Was it on a criminal case?

A. It had to do with DWI, I believe.

Q. Do you recall what the jury verdict was in the case?

A. It was a hung jury.

Q. Where do you work?

A. For SWEPCO here in Waldron.

Q. How long have you worked for them?

A. For sixteen years.

Q. How long have you lived in Scott County?

A. Since January of 1974.

Q. Do you know whether you or any member of your family has ever been a party to a lawsuit, either criminal or civil, or have you ever been a witness in any lawsuit?

A. No.

Q. In a criminal case of this type the State of Arkansas has the burden of proof to prove a defendant guilty beyond a reasonable doubt. And that is a burden that we, representing the State of Arkansas, accept, and the defendant does not have any burden at all. He does not have to prove to the jury that he is not guilty, or he does not have to prove or disprove anything that we prove. If you were selected on the jury can you accept that fact, or would you want to require the defendant to prove his innocence?

A. I would make my decision based upon the facts.

Q. Okay, on the facts that we as the State of Arkansas put on?

A. Yes.

Q. You would not require the defendant to put on any evidence to prove that he was innocent?

A. No.

Q. You would leave the entire burden with the State of Arkansas where it is by law, then?

A. Yes.

Q. Do you believe in the death penalty?

A. Yes.

Q. Do you think that sometimes it helps cut down on crime to keep some people from committing crimes that would otherwise?

A. I feel that it is a deterrent, yes.

Q. And from having served on the case involving DWI or something, you know that under the law of Arkansas the jury not only determines guilt or innocence of the defendant, but the jury also fixes punishment; that is not left up to the Judge. Do you realize that?

A. Yes, I do.

Q. If you were selected on this jury and you served, at the end of the trial after hearing all of the evidence, and after hearing the law that the Judge gives you, if you found this was a proper case for the death penalty under Arkansas law, could you and would you vote to impose that penalty?

A. Yes, I would.

Q. Do you know of any reason why you could not serve on this trial and give a fair trial to both the State and the defendant?

A. No, I do not.

MR. KARR: That's all

BY MR. SETTLE:

Q. Mr. Sunderman, how old are you?

A. Forty-one.

Q. Are you married, sir?

A. Yes.

Q. Do you have children?

A. Yes.

Q. How many children do you have?

A. Two.

Q. How old are they?

A. One age nine, and one age fourteen.

Q. A boy or girl?

A. The boy is nine, and the girl is fourteen.

Q. I believe you stated that you read or heard a little bit from the media on this case.

A. Yes, I have.

Q. Would you mind telling me what you had heard, what you remember?

A. Well, I remember that the altercation that took place, to the best of my recollection, was at a service station, and of course I remember the names that were mentioned, and the TV and news accounts of this.

Q. Okay, what names were mentioned?

A. The names that I remember being mentioned were Randy Basnett and Mr. Swindler.

Q. All right, now did you watch the television?

A. Yes, I did.

Q. Okay, now you were living here in Scott County at that time?

A. Yes, I was.

Q. Now, do you live in town?

A. Yes, I do.

Q. Do you get the cable?

A. Yes.

Q. Which station were you watching on that?

A. To the best of my recollection, Channel 5.

Q. Okay, how long do you feel you watched those reports?

A. Well, as a general rule, I usually watch Channel 5 news every day.

Q. Did you read the newspaper accounts?

A. I wouldn't say that I read them every day, but I usually look through the paper. I don't read a newspaper, I would say, as closely as I watch TV. So I wouldn't say that I read the news accoun ts of it every day, but I did watch TV every day.

Q. All right, did you remember anything about the defendant's background, where he came from, or anything like that?

A. Yes, I guess I do.

Q. All right, would you tell me what you remember, please?

A. To the best of my recollection, I remember that he, Mr. Swindler was from North or South Carolina. I remember that there were some charges, to the best of my recollection, that had been brought against him in that state.

Q. Do you remember what those charges were?

A. Really I don't. It seemn to me, to the best of my recollection, it was some sort of assault charges.

Q. You don't know anything more about it than that?

A. Not to my recollection, I don't remember anything other than that.

Q. Okay, did you talk to anyone about this case at that time?

A. Yes, to the best of my recollection, I think, you know, it was discussed, yes.

Q. Did anyone express any opinions to you about the case?

A. Yes.

Q. What did they say?

A. The ones that discussed it with me, particularly, I would say, you know, after the trial that they were convinced.

Q. All right, now at the time this happened did you discuss it with anyone?

A. Well, there again, to the best of my recollection,

it was discussed, and I don't remember any of the details of the discussion, but I think it would be like any other news item, that it was talked about.

Q. All right, now did people, again did people state opinions to you that at that time, at first?

A. To the best of my recollection, yes, they did.

Q. Do you remember what those opinions were?

A. The majority of them were that they felt that he was guilty.

Q. Did anyone state to you that their opinion was that he was not guilty?

A. Not to my recollection.

Q. All right, did you ever express an opinion to these people when you were discussing the case with them?

A. To the best of my recollection, I would say that I probably did, yes.

Q. All right, what do you recall that opinion to be?

A. At that particular time I feel that I was of the opinion that he was guilty.

Q. All right, is that your opinion at this time?

A. I did not hear all of the evidence at that time, and based on what I did hear at that particular time I had an opinion at that time; at this time I would base my opinion on the evidence that was

presented.

Q. All right, now did you follow the reports of the case when it was first tried?

A. Oh, well, to some degree, yes.

Q. Did you feel that the findings of that jury had some relevance?

A. Well, I feel like that any jury that hears the evidence that is presented to them, I feel like, you know, twelve people come to the same conclusion, that I feel like, you know, they have made a decision based on what the facts that they were aware of.

Q. Well, what I am asking you is, do you feel like because they came to that conclusion that the defendant may well be guilty?

A. I would say yes.

Q. You would say that?

A. Yes.

Q. All right, that is an opinion that you have?

A. I have the opinion that the twelve, based on the facts that were presented to them, made a decision based on those facts, yes.

Q. All right, now then if you were selected for the jury would you require the defendant to present evidence to set aside that opinion?

A. Well, as I said before, I had my opinion at that

time, and I feel like if I sit on any jury it would be my duty to make my decision at that time, based on the facts that were presented to me, not what had been presented somewhere else.

Q. All right, in other words you are saying that you would only consider what was being presented to you?

A. Yes.

Q. You would not be considering what another jury had considered, what their verdict was, or anything like that?

A. No.

Q. Now, of course, you stated that you had read these reports, at one time you did form an opinion?

A. Yes, I did.

Q. All right, now if you were selected to the jury do you feel as you were listening to the evidence that that prior opinion would prevent you from, oh, weighing the evidence? Do you think it would get in the way of your deliberations?

A. Well, I would hope not. Now, like I say, I think I cannot tell you that a thought would not cross my mind.

Q. All right, now if that thought did cross your mind

would you report that to the Court that you could not keep the prior opinion out of the way of your deliberations?

A. I think that would be my duty, yes.

Q. Okay, do you feel that you might compare whatever evidence was presented in court to whatever you heard from the media?

A. I would do my best not to.

Q. But do you believe you would be able to not compare the evidence?

A. I don't think I could tell you without a shadow of a doubt that I would not.

Q. What I am asking you is, do you feel you could just listen to the evidence as presented in court and not consider the other evidence?

A. To the best of my recollection, I don't recollect what the evidence was.

Q. Well, the reports or anything like that?

A. Well, you mean if I was asked the question if I were presented reports that were made by the police?

Q. No, sir, what I am referring to, I think, is that if you were selected for the jury, testimony presented by the witnesses, would you be able to just consider that testimony, that evidence presented in this courtroom and not allow any other notion or opinions that you might have had before-

hand based on these media reports to get in the way of your consideration of this evidence?

A. If I were sitting on the jury I would weigh the evidence that was presented to me in the courtroom, and not what had been carried on TV or in the newspaper.

Q. Okay, I believe Mr. Karr has made some comments about the presumption of innocence, and you understand of course that right now the defendant is presumed to be innocent, and the State has the burden of proving its case, and they have to carry that burden of proof?

A. Yes.

Q. All right, this means that before you can find a person guilty you would have to find that the State meets its burden of proof on the elements of the evidence?

A. That's correct.

Q. And if you felt that the State had not met its burden of proof on one of the elements, would you be, would you find for the defendant?

A. If they did not prove to me beyond a shadow of a doubt that he was guilty, yes.

Q. Beyond a reasonable doubt?

A. Yes.

Q. Now, if you were selected as a juror, in the course

of this trial it might be evidence presented which would, might leave the Court and the Judge to instruct the jury on what lawyers call lesser included offenses. It would depend on what the Court felt to be appropriate. It would be like first degree murder, second degree murder, or even manslaighter, whatever the Court would feel was appropriate. Now, if the Court instructed you on that, and you felt the evidence was such, would you consider in your deliberations these lesser included offenses?

A. If that were the instructions of the Judge, yes.

Q. You would consider all possibilities?

A. Yes.

Q. Now, of course at this time the defendant is charged with capital felony murder. Now, it is a two-art process, I believe, and again Mr. Karr has gone over this. But the first part of course is the guilt or innocence stage, and I assume before this question, assuming this question that you were a member of the jury and the jury did find the defendant guilty. You are aware that there are two possible penalties under the statute?

A. Yes.

Q. One is the death penalty, and one is life without parole?

A. Yes.

Q. Now if you were presented this case do you feel that you could consider the possible of life without parole as an alternate penalty?

A. If this were one of the alternatives that was given to the jury?

Q. Yes, sir.

A. Yes, sir.

Q. Would you weigh them equally, and not weigh one possible penalty over another penalty?

A. No.

Q. You would give them both equal consideration?

A. Yes.

Q. Let me ask you one question at this point. Do you know any police officers?

A. Yes.

Q. All right, have you discussed this case with them before?

A. No, I have not.

Q. All right, has any police officer expressed an opinion to you about this case?

A. No.

Q. Okay, in this trial there most likely will be some police officers testifying. Would you give their testimony more credence than testimony of a private citizen playing witness?

A. No.

Q. Would you consider the evidence equally?

A. Yes.

MR. SETTLE: I have nothing further.

MR. KARR: He is good for the State.

MR. SETTLE: Your Honor, we submit this juror for cause; based on the background information he has we don't believe he is qualified.

THE COURT: Overruled.

MR. SETTLE: Your Honor, he is a good juror.

THE COURT: All right, where are you employed?

A. For SWEPCO.

THE COURT: Is that here in Waldron?

A. Yes, it is.

THE COURT: Do you work in the office?

A. Yes, I do.

THE COURT: All right, you have been selected as a juror in this case, and the Court does not believe there is any possible way that this case could ever be, the testimony started before Thursday. However, since you are here, if you would like to go to work, or do anything else, if you would call the Circuit Clerk's office around nine in the morning, I am sure

THE COURT: What was your answer?

A. No.

MR. KARR: Your Honor, she said she didn't think she could be sure. Wasn't that what you said?

A. That's right.

THE COURT: Do you have some doubt that you would be able to set aside your opinion and listen to the evidence here and decide the case solely upon what you hear in this courtroom?

A. Yes, sir.

THE COURT: You will be excused.

VOIR DIRE EXAMINATION OF THURMAN JONES

BY MR. KARR:

Q. Mr. Jones, do you know anything about the facts of this case?

A. Just the newspaper and TV, sir.

Q. Have you read about it extensively since it happened back in 1976?

A. Well, I will put it this way, I subscribe to the Fort Smith Times Record daily.

Q. So you have gotten a paper every day since this happened?

A. Well, I travel some, and sometimes I am not home

and don't see it. But I do read the paper.

Q. Well, based upon what you have read in the newspaper and what you have maybe seen on TV, have you formed an opinion now as to how the case should be decided?

A. Not now. The only opinion I could form is that the man was guilty because the jury found him guilty.

Q. Well, do you have that opinion right now?

A.I guess so.

Q. All right, now it is normal for people to form opinions about what they read in the newspaper and all that, and that is okay, but is the opinion you have right now so fixed in your mind that you could not set it aside if you were on this jury and then base your decision just on what happens in court?

A. I would hope that would be true. I didn't hear the evidence before and I don't know what they based that decision on.

Q. So if you were selected on this jury then you could base your decision just on what happens in this courtroom?

A. I travel a lot.

Q. Are you telling me that you could base your decision just on what happens here?

A. I think so.

Q. Have you ever served on a jury before?

A. Yes, sir.

Q. How many times?

A. I don't know, several.

Q. Have you ever served on criminal trials?

A. Yes, sir.

Q. All right, generally speaking, do you believe in the death penalty?

A. I am not too hep on it, but I think in certain cases I would believe in it.

Q. You think in some cases then it is a proper form of punishment?

A. Yes, sir.

Q. What kind of cases do you think it is proper for?

A. Well, my friend, if I was on the jury I would have to hear the case before I could decide that.

Q. Well, could you class some crimes, like some murders, treason?

A. I would rather not. It would have to be an extreme case before I would go for the death penalty.

Q. Okay, and you understand that under Arkansas law we have enacted a death penalty statute for some crimes, such as a homicide or murder committed during a robbery, or rape, or something like that, a murder for hire, the murder of a police

officer acting in the line of duty, and those things. And if you were selected on this jury, and under our law the death penalty was proper in this kind of a case, and you found that to be the facts, would you and could you vote for the death penalty?

A. I approve of the Arkansas law as I understand it.

Q. So you could follow the Arkansas law and impose the death penalty where it was appropriate, if that were called for?

A. Yes.

Q. All right, you understand under our law that a defendant is presumed to be innocent as he sits in the courtroom right now. Legally speaking, he is innocent until he is proven guilty beyond a reasonable doubt. Do you accept that principle of law?

A. I do, and I would accept it more if he had not been tried. The only thing I am wondering about now, since he has had a trial, and I know about it, I am wondering if he is not going to have to prove to me that he is innocent.

Q. Well, that is what I am going to get up to in just a minute. I want to ask you that question. You are getting two or three questions ahead of me.

Now, we as the S tate of Arkansa have the burden of proving him guilty, and the entire burden rests with the State of Arkansas to prove this defendant or any other defendant guilt beyond a reasonable doubt. Now, the defendant does not have any burden of proof at all; he does not have to prove that he is innocent, or he doesn't have to disprove anything that we prove about him. And that is just a matter of our law, and that is the way it is. Can you accept that in this case?

A. Well, I would hope I would be able to do that.

Q. All right, and if you were selected on this jury would you hold the State of Arkansas to its burden of proving him guilty beyond a reasonable doubt?

A. Yes, sir.

Q. And you would not, on the other hand, require him to present any evidence that he is not guilty?

A. No, sir.

Q. Do you know of any reason why you could not serve on the jury and give a fair trial both to the State of Arkansas and the defendant?

A. The only reason I would know of is I don't want to, but that is the only reason I can think of.

Q. You mean you don't want to serve on the jury?

A. No, sir.

Q. But you will if that is what is required?

A. Well, I think it is my duty, if I am called to.

Q. Is there anything about sitting on this jury for two or three days that would cause you any hardship, that would keep you from giving the attention to the trial that it deserves?

A. Not cause me a hardship; this week is causing me a hardship. I travel the State of Arkansas, and I spent the entire week sitting here waiting, and I need to be out working.

Q. Who do you work for?

A. I am an independent factory representative, I am an independent salesman. I travel the entire state of Arkansas.

MR. KARR: I believe that is all the questions I have.

MR. SETTLE:

Q. Mr. Jones, how old are you?

A. Sixty-four.

Q. How long have you lived in Scott county?

A. I moved here in 1952, I believe that is 26 years.

Q. Where did you live before that?

A. Fort Smith.

Q. Have you lived in Arkansas all of your life?

A. Yes, sir, I was born down at Booneville, south of Booneville.

Q. All right, the job you are doing at this time you are a salesman?

A. That's right.

Q. How long have you been doing that?

A. Well, I had a hardware store here for twenty years, and I have been a traveling salesman on the road for about six years, something like that.

Q. Where do you travel to?

A. The entire state of Arkansas.

Q. All over the place, huh?

A. Yes, sir.

Q. Do you have any employees?

A. No.

Q. All right, now I believe you told Mr. Karr that you heard some reports on TV and newspaper?

A. Yes, sir.

Q. Do you live here in town?

A. Yes, sir.

Q. Do you have the cable?

A. Yes, sir.

Q. All right, do you subscribe to the Fort Smith paper?

A. Yes, sir.

Q. Did you follow the accounts in the paper?

A. I have not completely read an account until yesterday.

Q. Which paper was that?

A. In the Fort Smith Times Record.

Q. All right, what do you recall in all the accounts that you read?

A. Well, I didn't know until yesterday what the defense was, or I had no idea what the defense was, because I read the headlines; but the only complete article I read was yesterday.

Q. Could you tell me what you recall from all the accounts, newspaper, television?

A. Well, my friend, if you've got time, yeah, I will tell you.

Q. I've got the time, go ahead.

A. Well, I read where a police officer was shot in Fort Smith. I read where the man took off and they caught him down in the bottoms. I heard this on TV, I don't know. And that they arrested the man, and put him in jail And then they sent him to Little Rock for a sanity test for thirty days.

Q. Have you been following this case fairly closely?

A. Well, on top of that I read where he was accused

of killing two more in South Carolina.

Q. What do you recall about that?

A. That's all.

Q. Just that he is accused of killing two people?

A. Yes, sir.

Q. Do you remember the ages?

A. They were teenagers.

Q. Did you ever discuss this case with anybody?

A. Well, I guess I did; I don't know, I don't remember it.

Q. Well, do you remember if anybody ever expressed an opinion to you about this case?

A. Yes, sir, I have had several.

Q. Did people tell you they thought he was guilty?

A. Well, I haven't talked to anyone that is any smarter than I am, so I wouldn't say that. If they had told me he was guilty or anything, it wouldn't amount to anything as far as I am concerned. That is their opinion.

Q. Well, did you ever tell anyone that you thought he was guilty?

A. Not that I recall.

Q. Okay, did anyone ever express the opinion to you that they thought he was not guilty?

A. No, sir, I never heard that.

Q. Now, after all that, after all these reports, your talking to people, and hearing this, did you form an opinion at that time?

A. As I said to start with, I formed the opinion when he was convicted that he was guilty.

Q. All right now, are you referring to the trial in Sebastian County?

A. Yeah, Sebastian County, that's right.

Q. All right, now is it your opinion he has already received a fair trial?

A. I don't know, I didn't hear any part of the trial; I don't know anything about the testimony.

Q. Is it your opinion that he does not need a second trial?

A. That's not for me to decide; that is up to the Supreme Court to decide that. So that is not my prerogative.

Q. All right, now you understand of course that in a criminal case the defendant is presumed innocent?

A. Yes, sir.

Q. Can you give this defendant the presumption that he is innocent at this time?

A. Well, I would base anything - if I was on the jury I would base anything on my decision on what I heard in this courtroom, if that is what you are driving at.

Q. Well, in a way. But I think what I am asking you is, I think we need a little more direct answer. Can you give this man the presumption of innocence; as he sits there he is presumed to be innocent. Can you give him that presumption?

A. Not the same amount that I could have had he not been convicted.

Q. Are you saying that because he has already been tried that you cannot presume him innocent?

A. No, I am not saying that at all.

Q. Well, I guess-I don't guess I understand what you are saying. Maybe you had better explain it a little bit to me so I can understand.

A. Well, I don't know any better way to put it than it has been put. The only thing, I have not considered in my mind whether the man is guilty or innocent. The only thing I assume I don't know of any other assumption I could be under with what I have heard, and read, except that he was guilty.

Q. Is that your opinion?

A. Well, that is the only assumption I know that I could have.

Q. Well, that's your opinion?

A. Well, I am trying to explain to you.

Q. Well, let me ask you this. Would you require

the defendant to put on, or would you require something from the defendant to remove that assumption, that view?

A. I stated at the first that I would listen to the evidence in this case. Now I don't want on the jury, I am not trying to get on the jury. Don't misunderstand me. But I think I should try to be as fair as I could.

Q. Would you require anything from the defense side to remove those opinions that you stated?

A. What I have told you before is I would take what happened in this courtroom, and when the Judge gives the instructions to the jury I will follow the Judge's instructions and the law to the best of my ability, period.

Q. Now, do you feel you will be able to put out of your mind what you have read or heard?

A. I don't think that would be necessary.

Q. You don't believe it would be necessary? Why not?

A. Well, my mind is not something I erase one morning, and get up the next morning and start writing it again. My mind don't operate that way.

Q. In other words, you would be remembering all you have heard?

A. No, I wouldn't be. When I told you, my friend, that

if I was put on that jury I would listen to what was said, and base my opinion on that, period.

Q. You would not consider anything you had heard?

A. No, I don't think so.

Q. You would not compare whatever evidence the State might have, with whatever you have heard before?

A. I haven't heard anything about the evidence; I don't know anything about that.

Q. Well, nobody does right now. We are starting all over again.

A. I mean, I don't know anything about the evidence of the previous trial.

Q. Well, if you were selected for the jury, and you were sitting on the jury, you would be comparing what you have heard in the media accounts, from the evidence what the State is putting on you would not be comparing?

A. Well now, my friend, I am trying to make it clear to you, which I think is unnecessary, that I would take the evidence and the law in the case and base my opinion on that.

Q. All right, and you would just consider what was in this court?

A. That's what I am trying to convey to you.

Q. All right, I guess I am just asking the same question and getting the same answer. Right?

A. Yeah, we can go all day if you want to.

Q. Well, I don't think I want to do that. All right, now of course you stated you served the jury apparently numerous times in the past?

A. Yes, sir, numerous times.

Q. All right, have you served in criminal cases?

A. Yes, sir.

Q. About how many times have you served in criminal cases?

A. How many times? Well, I couldn't tell you, several.

Q. Several times?

A. Yes, sir. We convicted some, and we turned some loose, if you are interested in that.

Q. All right, did you ever sit on a murder case?

A. I don't recall ever sitting in a murder case, but I did on a rape case.

Q. Do you recall the verdict in that case?

A. Well, at my particular time it was a hung jury. And then they stuck him later.

Q. All right, now you told me quite clearly that you would just consider what was presented. Now, if something stuck in your mind, or you remembered something that you heard outside the courtroom.

A. My friend, I will do the best I could.

Q. Well, let me go ahead and ask my question, and then you can tell me again. Now if you were on the jury, and you were deliberating on your verdict, and something stayed in your mind, you could not get rid of it, would you tell the Judge you are having a hard time because of that?

A. My friend, I have been foreman of a jury over there in one case. I had two people inside the courtroom after we went in and retired, I was foreman of the jury, and one of them said he couldn't vote for guilt because of so and so, and the other said he couldn't vote because of so and so that had nothing to do with the case. And today if that happened and I was foreman of the jury I would report it to the Judge in two minutes.

Q. well, what I am saying is, if you had a problem with the case.

A. I don't anticipate any problem.

Q. But you would?

A. I would report it to the Judge, yes, sir.

Q. Do you know any police officers?

A. Oh, yeah.

Q. Are you related to any?

A. No, sir.

Q. Have you ever discussed the case with them?

A. Not that I recall.

Q. Do you recall any officer ever expressing an opinion to you?

A. No.

Q. Now this case, I anticipate there will be some police officers testifying. Would you give their testimony any greater weight than you will any other citizen's testimony?

A. No.

Q. Now in this case testimony may warrant that the Judge will give instructions on what we might call lesser included offenses, and I am sure you are probably familiar with that?

A. Yes, sir.

Q. All right, of course the defendant is charged with capital felony murder, that is the most serious homicide charge. There are other homicide statutes, and the ones I am familiar with are first degree murder, second degree murder, manslaughter. Now, depending on what the Court feels appropriate, if the Court would instruct you on these offenses, would you consider them?

A. If the Judge said so, yes, sir.

Q. Now, just for this question, assuming that you were a member of the jury -

A. I hope you disqualify me, that is what I am

trying for, sir.

Q. Assuming you are a member of the jury, just for this question, assuming that you are a member of the jury and the jury finds the defendant guilty. That would be the first part of the proceeding. There are two parts.for this sort of offense. The first part is the finding of guilt or innocence. If the party is found innocent, of course, then the case is dismissed. Now if the person is found guilty then the jury will consider, there would be a second stage and the jury would consider what punishment they should give. Now in this sort of case there are two alternatives, one is life without parole and the other is the death penalty. Do you feel that if you listen to the evidence, that you would give equal consideration to the life without parole as well as the death penalty?

A. I will follow the Judge's instructions. If he told me to take that into consideration, I will.

Q. Would you weigh the alternate penalties equally?

A. If the Judge said so, yeah.

Q. All right, now it may come in the testimony and the evidence that there is a possibility that the defense of self-defense may come up in this case. Do you believe it is possible for the fact of self-defense when there is a police officer involved?

Do you believe that is an appropriate defense? Do you think that is a valid defense?

A. I didn't get that question.

Q. All right, I am asking, do you feel that the defense of self-defense could be a defense in a case involving a police officer? Assuming, of course, if the Judge were to instruct you on that, do you think you could consider that?

A. Well, if the Judge instructed me, yes. But now I didn't know that self-defense was involved in this thing until yesterday's paper.

Q. Well, now I am just asking you to think about it. Now, Mr. Jones, if you are selected for this jury do you think you could just consider the evidence presented to you and not consider anything about the defendant's background, or anything about that?

A. Well, I believe we went over that about four times already.

Q. I mean his background before he came to Fort Smith?

A. The only thing I know is what was hearsay, and that had not been proved.

Q. You would not consider that in this court?

A. No, sir.

MR. SETTLE: Your Honor, I am going to submit this man for cause. I believe

his answers have been contradictory, and he has too much information about the defendant's background. Therefore I believe he should be disqualified.

THE COURT: You will be overruled. I think as far as cause is concerned, he is a good juror. You will be overruled, and I will note your exceptions.

MR. KARR: Mr. Jones is good for the State.

MR. SETTLE: He is good, Your Honor.

THE COURT: All right, Mr. Jones, there are some things I need to say to you. First, we have decided that the testimony in the case will not start until next Monday. So I am not going to require you to remain around. So you may do whatever you like and make your own plans, until Monday. I am going to excuse you until that time. Now, of course, you say you served on juries previously, and I am sure you realize that you are now and will be a member

of the jury. So you should not permit anyone under any circumstances to discuss this case with you, and I know you will not. Do not permit anyone to discuss anything about it in your presence. I am sure you realize the extreme importance of that. And again what we have been talking about all morning is that this case must be tried on the evidence introduced in this court at the trial. So if it will help you any between now and Monday you are excused. You might want to check back with the Sheriff or the Clerk; there is always the possibility that we will not even have the jury by Monday, but we plan to start the testimony Monday morning. So you will be excused until that time.

All right, gentlemen, I think we should take our noon recess at this time until about 1:25. Court is in recess.

(Court is reconvened from the noon recess).

VOIR DIRE EXAMINATION OF JAMES RICHMOND

BY MR. KARR;

Q. Mr. Richmond, do you know anything about the facts of this case?

A. Yes, sir.

Q. Where did you get your information?

A. Radio, TV, newspaper.

Q. Have you followed it fairly closely since it happened back in 1976?

A. Yes, sir.

Q. Based on what you have read and heard at this time, do you have an opinion as to how the case should be decided?

A. Yes, sir.

Q. Is that opinion firmly fixed in your mind?

A. Yes, sir.

Q. Do you feel if you were selected to sit on this jury you could not lay that opinion aside, and base your opinion just on what you hear in court?

A. No, sir.

THE COURT: Are you saying you feel you could not lay your opinion aside and disregard it, and try the case solely on the evidence presented here at the trial?

A. No, sir, I don't think I could.

MR. LANGSTON: We submit him, Your Honor.

THE COURT: This juror will be excused.

VOIR DIRE EXAMINATION OF BERNICE GRIMES

BY MR. KARR:

Q. Mrs. Grimes, do you know anything about the facts of this case?

A. What I read in the papers, and television when it happened, and since then.

Q. Have you followd those news stories fairly closely?

A. Fairly close, yes.

Q. Based upon what you have read and seen on TV, do you have an opinion at this time as to how this case should be decided?

A. Well, my opinion was at the time and still is that he was guilty.

Q. Now, it is natural to someone who has read those things in the newspaper and who has followed the TV news accounts of it would have some sort of an opinion, but is that opinion such and so fixed in your mind that you could not lay it aside?

A. I think probably it is.

Q. Do you think if you were selected on this jury that you could hear the evidence that is presented

VOIR DIRE EXAMINATION OF MILTON STAGGS

BY MR. KARR:

Q. Mr. Staggs, do you know anything about the facts of this case?

A. I heard a little bit on the news, read a little in the paper.

Q. Have you followed it very closely since it happened back in September of 1976?

A. Not really.

Q. Based upon the things that you have seen on the news and read in the newspaper, do you have any opinion at this time as to how the case should be decided?

A. Well, I would really know how to answer that, without knowing more of the facts.

Q. All right, well I am just asking you based on what you have read and heard now, do you have an opinion about what the outcome of the case should be?

A. In other words, have an opinion like it was, like the news reported?

THE COURT: Yes, based upon what you have read and heard, do you have an opinion based on that?

A. Well, I wouldn't say I would dispute what all the news that came out; I wouldn't say I have a right to do that.

BY MR. KARR:

Q. Well, there is nothing wrong with having an opinion now. I am just trying to ge t up to some other questions. And if you do have an opinion well that is just natural based on what you have read and heard.

A. Well, sure, based on what came out, I don't know how it could be otherwise, you know.

Q. All right, now what I want to ask you, is that opinion, if you have one, is it so fixed in your mind that you could not set it aside, and if you were on this jury just base your decision on what you hear in this courtroom?

A. Yeah, I believe I could.

Q. Okay, you could set aside the opinion that you now have if you were on this jury, and then listen to the evidence that is presented in this courtroom and base your decision just on the evidence that is presented?

A. That's right.

Q. Have you ever served on a jury before?

A. I don't think so.

Q. How long ago was that?

A. I would say approximately two or three years, probably between two and three years ago.

Q. Do you know if it was on a criminal case or civil case?

A. Civil.

Q. As far as you know, you have never served on a criminal jury then?

A. No, sir.

Q. Do you believe in the death penalty?

A. Yes, sir.

Q. Do you think it is proper punishment for some crimes?

A. I believe so.

Q. Under the law of Arkansas the jury not only sits in determines guilt or innocence of the defendant, but if the jury finds the defendant not guilt it also fixes the punishment, that is not left up to the Court. And do you realize that as you go into this trial?

A. Well, yes.

Q. If the jury finds this defendant guilty then the jury will actually fix the sentence?

A. Yes.

Q. All right, now this - the defendant is charged with capital murder, specifically that he caused the death of a police officer who was acting in the line of duty. And under our law that is one

of the capital crimes. There are two punishments for that particular crime - one is life imprisonment and the other is death. And we have a two-stage trial here. It is really like two trials in one. In the first part of it the jury will hear the evidence, and then go out and vote on guilt or innocence, and that is all they would consider at that time. And if the jury finds the defendant guilty then they will return that verdict to court, and then we would go into the second part of the trial. And we present evidence as to the punishment. And it is not up to the jury just to select one or the other as they choose; but that is to be based on the evidence of aggravating circumstances, and mitigating circumstances. And aggravating circumstances are those things about this particular case that make it more serious than another case of the same kind, another capital murder case where a police officer was killed. Mitigating circumstances are those things that make this case less serious than another one just like it. And under our law if the aggravating circumstances, or if the jury finds that the aggravating circumstances outweigh the

mitigating circumstance then that is a proper case for the death penalty. So if you sit on this jury and you made that finding, could you and would you vote to impose the death penalty in accordance with the Arkansas law?

A. Yes, sir.

Q. Now under the law in this country a defendant is presumed to be innocent until proven guilty beyond a reasonable doubt in a court of law. And do you accept that legal principle?

A. Yes, sir.

Q. And can you give that presumption of innocence to this defendant as he sits here in the courtroom right now? That is, that he is innocent under this presumption until proven guilty in this court?

A. That's right.

Q. Now in that regard we, as the State of Arkansas, have the entire burden of proof, and we have the burden of proving his guilty beyond a reasonable doubt. The defendant under our law does not have any burden at all. He does not have to prove that he is innocent; he does not have to disprove anything that we prove against him. Now would you make us, as the State of Arkansas, would you

hold us to our burden of proving his guilt beyond a reasonable doubt?

A. Well, sure.

Q. On the other side of the coin, you would not require him to prove that he is innocent?

A. Well, I think you know, you would have to base it on facts either way you went.

Q. Right, you would have to base your decision on the evidence that is presented in court. What I am asking about is this burden of proof thing. You would require us as the State of Arkansas to prove him guilty, and on the other side of the coing, you would not require him to prove that he is innocent? The entire burden is on the State in this case.

A. Well, he would have to prove he is innocent if you saw him innocent. I mean, if that answers your question.

Q. Well, if the State does not prove him guilty then he would be in his natural right. But he would not have to prove he was innocent, it would be us failing to meet our burden of proof. So I am just asking you, would you require us as

the State of Arkansas to prove him guilty and not require him to prove that he is innocent?

A. Well, I think you would have to prove he was guilty.

THE COURT: Let me see if I can help without interjecting too much. Under the law that you will be instructed about if you are a member of the jury, as Mr. Karr has said the burden of proof is entirely upon the State of Arkansas to prove the guilty of any defendant beyond a reasonable doubt. You fully understand that?

A. Yes.

THE COURT: Under the law any defendant in a proceeding of this nature is presumed under the law to be innocent. Do you understand that?

A. Yes.

THE COURT: All right, now under the law, then, and this is the law, and I am going to ask you if you can accept it and follow it; under the law then the defendant would be under no burden to prove his innocence, since the burden is upon the State to prove his guilt. Do you understand that?

A. Yeah, you are right.

THE COURT: All right, therefore he is under no duty to put on any evidence to establish his innocence or to refute his guilt, as he wishes. And that is the law, in cases of this nature. Now, if you should be selected to serve on the jury could you and would you require the State of Arkansas to prove him guilty beyond a reasonable doubt before you would convict him?

A. That's right; yeah, you would have to do that.

THE COURT: All right, and the Court is telling you under the law he is presumed to be innocence, and he is under no duty to offer any evidence in his behalf, and can you accept that as being the law?

A. Uh huh.

THE COURT: You would not hold it against him if he should elect not to put on any evidence, but base your verdict

solely upon whether or not the State has proved his guilt to your satisfaction beyond a reasonable doubt?

A. Yeah, I would have to go by that.

THE COURT: You can accept those principles of law, and will follow them if you are selected on the jury?

A. That's right.

THE COURT: All right, Mr. Karr, go ahead and continue. I thought I might help.

BY MR. KARR:

Q. Is there anything about serving on this case if selected on the jury that would cause any particular hardship for you, that would keep you from devoting the attention to it that it deserves?

A. Not that I know of.

Q. Do you know of any reason why, if you were selected to sit on this jury, you could not give a fair trial to both the State of Arkansas and the defendant?

A. No, sir.

MR. KARR: That's all.

BY MR. SETTLE:

Q. All right, now Mr. Stagge, I believe you stated you heard a few of the reports and the accounts in the media, television. Didn't you tell Mr. Karr

that you had heard a little bit about this case?

A. Right, sir.

Q. Let me just ask you this. Do you recall those accounts, do you recall what was reported?

A. Well, I just saw some of the skits on TV. I read the newspaper.

Q. Which newspaper was that?

A. The Fort Smith Times R cord.

Q. Do you get the Fort Smith paper?

A. Yes, sir.

Q. Do you live in town?

A. Uh huh.

Q. Are you on cable?

A. No, sir.

Q. You just get Channel 5?

A. Yes.

Q. Did you follow these accounts very closely?

A. No, sir, because I worked evening and nights a lot and I don't catch it all.

Q. Would you tell me what you remember?

A. Well, I couldn't really right off, more than than just, you know, it come in on the news about this incident that happened.

Q. Just go ahead and tell me what you know.

A. Well, I couldn't say I could tell you all I knew, but I do remember, you know, just when it come

in on the news about a policeman getting shot, and really I didn't keep up with a lot about the trial situation. I did some, but I couldn't offhand tell you. That's all I did.

Q. All right, do you remember anything else except a policeman being shot?

A. Well, I kept up, you know, and saw they caught a person.

Q. They caught the person?

A. Well, they got him.

Q. Well, which person was that?

A. Well, the person they said did it.

Q. Which person was that?

A. That was Swindler.

Q. You mean the defendant?

A. Uh huh.

Q. All right, did you discuss this case with anybody?

A. Oh, I probably did.some with my wife.

Q. Did other people discuss it with you? Besides your wife?

A. Oh, I wouldn't say I didn't some, but not a lot.

Q. Did anyone express an opinion to you about this case, about how it should be decided?

A. No.

Q. You don't recall anybody saying that they thought he was guilty, or anything?

A. Well, I don't believe, I don't believe I heard anyone just come out and say they believed it.

Q. Did anyone ever express an opinion to you that he was not guilty?

A. No.

Q. Did you ever express your opinion to anyone else?

A. No, I really didn't.

Q. Okay, did you get any information on where the defendant came from, where he had been before, or anything like that?

A. No. I did hear about another incident or two, someone was telling me, but I don't remember where it was at.

Q. All right, why don't you go ahead and tell me about that?

A. Well, I just heard there was two more people that had been killed by him.

Q. Had been killed by him?

A. That's true.

Q. Did someone tell you about that?

A. I don't believe I read it, I believe someone did. I don't know whether they was talking directly to me, or just some people in a conversation was

had, but I do remember vaguely..

Q. All right, based on that, have you formed an opinion in this case?

A. Well, I would just have to form it on what you heard, I mean, you know, you hear these things. I won't say that I said it either way, because something like that you see on the news. I guess if I would say the way I saw it, probably most of the time you think well, it happened, or, you know, they wouldn't be putting it out. But just as far as really coming down and saying you knew it did, you couldn't say that.

Q. But did you have an opinion about this case, based on what you had heard?

A. I don't know, you might call it an opinion. You hear these things and, well, we have to - what's going on, you don't believe it is all false; you believe there are some facts about it.

Q. All right, I guess I am going to have to ask you to try to respond to my question the best you can, because I think you might be having a little difficulty with it. I am asking whether based on all you've heard, and all the discussions or whatever, after that if you formed an opinion, whether you knew anything about it or not, have

you ever talked to anybody about this that said they had first-hand knowledge about the incident?

A. No, sir.

Q. I am just asking you then, based on what you heard did you form an opinion about this case as to the defendant's guilt or innocence?

A. Well, I would have to say based on what I have heard, and the belief of the people, I would have to have a little bit of an opinion.

Q. What would that opinion be?

A. Well, it would have to be like it came out.

Q. Do you have that opinion at this time?

A. Yes, I guess you would say, to an extent. Not that I couldn't change it if it was different, but I still believe, you know, you would have to have some confidence in the people.

Q. Is that a fixed opinion, you feel you would have difficulty getting rid of that opinion?

A. No, I can accept facts.

Q. All right, and would you require the defendant's side of the case to put on evidence, or some sort of evidence to change that opinion that you have?

A. Would you repeat that?

Q. I am asking you, would you require something from

the defendant's side of the case before you would change the opinion that you have?

A. No. If I was on the jury I could listen, you know, to the trial; and if there was a difference, I wouldn't pay any attention to my opinion because if I listen to that I will listen to the facts that are brought out.

Q. All right, now if you were selected for the jury do you believe that you would be able to listen to the evidence and just not consider anything else you may have heard?

A. Right, that's the only way I would listen.

Q. Do you believe that you would be able to avoid comparing what you had heard with whatever you had heard prior to coming into court? In other words, just consider what you heard in court?

A. Right.

Q. You would not compare the State's evidence, or whatever the evidence might be with what had been reported?

A. I would only want to hear what went on at the present.

Q. Now, if you felt that the opinion was making it

difficult for you while you were deliberating on the case, after the case was presented to you, and you felt you were having difficulties getting rid of your opinion, or your opinion was conflicting with what the evidence had been, do you feel you could report that to the Court, the Judge?

A. I wouldn't serve on it if I couldn't drop my opinion; I wouldn't go with a thought either way.

Q. All right, now in this case I anticipate that the State will call as witnesses some police officers. Now, would you be giving their testimony any greater weight than private citizens' testimony?

A. No.

Q. You would just consider their testimony on an equal basis of another person's testimony?

A. Right, I would have to be fair.

Q. Do you know any police officers, sir?

A. Just local here.

Q. Are you related to any?

A. No, sir.

Q. Have you ever discussed this case with anybody or any police officers that have ever expressed an opinion to you about it?

A. No.

Q. Do you feel like if you were a member of the jury

and owe, whether the jury brought back a guilty or not guilty verdict you would owe any explanation to any officer?

A. No, sir.

Q. All right, now it may come in the testimony that is presented in court that the Court may decide that it is appropriate to instruct the jury on what we call lesser included offenses. Now, this would be in the homicide area. The most serious offense is capital felony murder. That is what the defendant is accused of. The next most is first degree murder, and then there is second degree murder, and manslaughter. Of course, it would depend on what the Court would feel appropriate. Now, as the Court has decided to instruct the jury on these lesser offenses, could you as a juror consider these lesser offenses?

A. Certainly.

Q. Now, I know Mr. Karr discussed the procedure. Now, just assume for the purpose of this question, it is hypothetical, that if you were selected as a juror that you as a member of the jury, and the jury in all, decided to vote the defendant guilty. Now, that is the first step. The second step, of course, is to decide on the punishment. Now, there

are two possible penalties. First if life without parole, and the second is the death penalty. Now, do you feel that if the evidence were presented to you, and you got to this point, that you could consider the life without parole as an alternative, or do you feel you could consider it equally with the other penalty?

A. Right.

Q. You wouldn't weigh one over the other?

A. Not based on the facts, it would be the best of my knowledge.

Q. You would require the State to prove its case beoynd a reasonable doubt?

A. Right.

Q. Okay, now, Mr. Staggs, referring back to the penalty stage, now if you were considering on the penalty to be imposed do you believe that you could set aside anything you may have heard and consider only what was presented in court?

A. Right.

Q. You could set aside whatever someone else told you about the defendant's background and just consider what's here?

A. Yes, to the best of my knowledge, what I gathered here.

Q. Let me just ask you a couple of general questions. How long have you lived in Scott County?

A. All my life, more or less.

Q. What sort of work do you do?

A. I work for Val-Mac Industries in poultry.

Q. How long have you worked there?

A. Seventeen years.

Q. Are you married?

A. Yes, sir.

Q. Do you have any children?

A. Four.

Q. How old are they?

A. About 22, 20, 16 and 10.

Q. How old are you, sir?

A. Forty-nine.

Q. Do you feel you can give the State of Arkansas and the defendant a fair trial in this case?

A. Yes, sir.

MR. SETTLE: Pass the juror.

MR. KARR: Mr. Staggs is good for the State.

MR. SETTLE: Your Honor, I will submit this man for cause. He has an opinion, and I believe he should be disqualified.

THE COURT: You will be overruled.

MR. SETTLE: Note my exceptions.
Your Honor, this juror is good.

THE COURT: All right, Mr. Staggs, you have been now selected for the jury and we are still in progress, of course, in making our jury and what our plans are is to, we do not intent to start the testimony in the case until Monday morning. So I am going to excuse you. The attorneys have agreed that in order to keep the jurors from waiting around that they may be excused until the testimony starts. There is always the possibility that we cannot even start Monday, but that is what we are aiming toward. So I am sure you fully realize the great importance of the fact that since you are a member of this jury that certainly you should not permit any person under any circumstances whatever to try to discuss this case to you, express any opinion to you, or anything

think that knowing that those are two alternatives and that under the evidence you could vote for either one of them after you find him guilty, do you think you could still consider it and find him guilty, knowing that those are the two possible punishments?

A. I could not if I knew the man was going to be put to death, I would not; I am just against the death penalty, because it is something that is final, it cannot be revoked.

Q. Are you telling us that you don't think that you can consider the death sentence in this particular case under any circumstances?

A. No, I could not. I do not believe in capital punishment.

MR. LANGSTON: I believe that is all the questions I have.

THE COURT: All right, the Court will excuse you.

MR. LANGSTON: Save my exceptions, Your Honor.

VOIR DIRE EXAMINATION OF THOMAS BRICKSEY

BY MR. KARR:

Q. Mr. Bricksey, do you know anything about the facts of this case?

A. Oh, yes.

Q. Where did you get your information?

A. Newspapers, television, radio.

Q. Have you followed it fairly closely since it happened back in 1976?

A. Yes, sir, you can't avoid it.

Q. Based upon what you have seen, heard and read have you formed an opinion now as to how this matter should be decided?

A. Yes, sir, I think so.

Q. Is that opinion so fixed in your mind that you could not set it aside and if you were selected on the jury to just base your decision on what happens in this courtroom?

A. Do you mean could I be impartial, yes, I could.

Q. All right, you understand it is natural for someone to form an opinion when they read about something like this based on what they read and hear. And there is nothing wrong with that at all. But if that opinion becomes so fixed in your mind that you could not set it aside and disregard it if you were selected on this jury, then you probably could not serve. But if the opinion is not so fixed that you could lay it aside, and then come into the courtroom and just base your decision on what happens in court, then you would be an acceptable juror. And do you think

that is your situation, that you could set aside your opinion and listen to the evidence and the instructions from the Judge, and the base your decision just on what happens here?

A. Yes, sir, I probably could.

Q. Where do you work, Mr. Bricksey?

A. I am self-employed, mainly as a house-painter.

Q. How old are you?

A. Forty.

Q. Are you married?

A. Yes, sir.

Q. Do you have children?

A. Yes, sir.

Q. How many?

A. Two.

Q. What kind?

A. Two girls.

Q. Their ages?

A. Fifteen and sixteen.

Q. Do you believe in the death penalty?

A. Yes, sir.

Q. Do you believe it is proper punishment for some crimes?

A. Yes, sir.

Q. Under Arkansas law the jury not only determines

not only whether the defendant is guilty or innocent, but the jury also fixes the punishment when they convict someone. And do you understand that; that is not left up to the Judge in our system?

A. Yes, sir.

Q. And in a trial like this where the defendant is charged with capital murder there are two possible penalties, one is death and the other is life imprisonment. But it is not up to the jury to just select one or the other as they choose, but we have a two-stage trial. It is really like two trials in one, and the first part of it is only concerned with the guilt or innocence of the defendant. Now if the jury finds the defendant guilty beyond a reasonable doubt, then we come back into court and we go into the second part of the trial, and that is the part where we get down to the penalty. And then when we get into that phase of the trial we present evidence about aggravating circumstances and mitigating circumstances. And the aggravating circumstances are things that make this case more serious than another one

just like it. And mitigating circumstances are things that make this case less serious than another one just like it. And then the jury balances the two of those, and if they find that the aggravating circumstances outweigh the mitigating circumstances then that is a proper case for the death penalty. Now if you were on this jury and you made that finding, could you and would you vote to impose the death penalty?

A. Yes, sir.

Q. You understand that each of the twelve jurors it has to be their verdict, and they have to sign the verdict, and come back into open court and announce that as their verdict?

A. Yes, sir.

Q. Under our law a defendant is presumed innocent until they are proven guilty beyond a reasonable doubt in court. Now, do you accept that legal principle as a basic part of our judicial system?

A. Yes, sir.

Q. Can you give that presumption of innocence to this defendant in this case? Do you know of any reason why you cannot?

A. No, sir.

Q. Just as a legal matter, he is presumed to be innocent right now, and you accept that?

A. Yes.

Q. Now, we as the State of Arkansas have the burden of proving a defendant guilty beyond a reasonable doubt in court. And converse to that, the defendant does not have any burden at all. He does not have to prove his innocence; he does not have to disprove anything that we prove about him. Do you know of any reason why you could not hold us, the State of Arkansas, to our burden of proving him guilty beyond a reasonable doubt?

A. No

Q. You understand that he does not have to offer any evidence to prove that he is innocent, and if he does not offer any evidence you cannot hold that against him, but you would require us to prove him guilty?

A. Yes, sir, I understand that.

Q. Do you know of any reason why you could not sit on this jury and give a fair trial both to the State of Arkansas and the defendant?

A. No, sir.

MR. KARR: That's all.

BY MR. SETTLE:

Q. Mr. Bricksey, am I pronouncing your name correct?

A. Yes, sir.

Q. How long have you lived in Scott County?

A. All my life other than military service.

Q. All right, which service were you in?

A. The Air Force.

Q. Do you work here in Scott County?

A. Yes, sir.

Q. What sort of work do you do?

A. Oh, mainly painting, repairs.

Q. Do you get the cable television?

A. No, sir.

Q. What stations do you receive?

A. 2, 6, 5 and 8, and educational channel, too.

Q. Now, where are 2 and 6 from?

A. Tulsa.

Q. Both of them from Tulsa?

A. Yes.

Q. Okay, do you get the Fort Smith paper?

A. No, sir.

Q. Do you get the local paper?

A. Yes, sir.

Q. Do you occasionally read the Fort Smith paper?

A. Oh, yes.

Q. About every day, or just occasionally, or what?

A. On the average of once a week.

Q. All right, now I believe when Mr. Karr was questioning you he asked you some questions about whether you knew anything about the case, and you indicated that you did know something about it, and that you heard some of the accounts. Can you tell me what you remember from these accounts?

A. All of it?

Q. Yes, sir.

A. Well, I remember when the case first started, when Mr. Basnett was killed, and about the subsequent events inasmuch as the defendant abandoned his vehicle, and ran away from the scene, and things that occurred after that. Also, about the first trial.

Q. All right, you remember what the verdict was at the first trial?

A. Oh, yes.

Q. You read about that?

A. Yes, sir.

Q. Well, what happened in the first trial, would that have any affect as to what was happening here?

A. Well, I am sure it would, but the question was could I render an impartial verdict, which I

think I could under the circumstances.

Q. All right, have you discussed this case with anybody?

A. Oh, yes, sir.

Q. All right, and have these people expressed an opinion to you about this case?

A. Yes, sir.

Q. Could you tell me what those opinions were? Did they think the defendant was guilty?

A. I am afraid it was almost unanimous.

Q. Did you ever hear anybody state that they thought he was not guilty?

A. No, sir.

Q. All right, now out of all this I believe you told Mr. Karr that you had formed an opinion.

A. Oh, yes.

Q. You have that opinion at this time?

A. Yes, sir.

Q. But now you feel even with this opinion you could set that all aside and sit here and listen what is presented in this court?

A. Yes, sir.

Q. Do you feel like there is no reason that anything you knew before would get in the way of your deliberations here?

A. I don't think it should.

Q. Well, I don't either, but -

A. Well, I am not sure I should answer yes or no. Would you rephrase that, please.

Q. Do you feel like, with all these accounts, and the opinion that you have, and the discussion with the other people, if you were selected for the jury could you set aside what you had heard and just render a verdict based solely on what was presented here in court, and not let anything else distract you or get in the way of your deliberations?

A. Yes, sir.

Q. You believe you could?

A. Yes, sir.

Q. Did you hear anything about the defendant's background, where he came from before he came to Fort Smith?

A. Yes, sir.

Q. What did you hear?

A. He was a South Carolinian, and he was wanted there.

Q. Do you know what he was wanted for?

A. Yes, sir.

Q. What is that?

A. Double murder.

Q. All right, do you recall anything about the alleged victims?

A. Other than they were young.

Q. You don't remember anything else?

A. Huh uh.

Q. Now, do you feel like it would take evidence on the part of the defendant to set aside this opinion you have? Something from the defendant's side of the case, or would you just be able to weigh what the State has presented?

A. Well, as I understand it, I would be required to judge solely on the State's evidence, and therefore that is, as I see it, the only thing.

Q. Do you feel that you would be able to presume the defendant innocent at this time despite your prior opinion, or the opinion you hold at this time?

A. Well, no, sir, I don't think he is innocent but I think the State would be required to prove that he is guilty.

Q. Now, are you telling me that, as a matter of law in our system of justice the defendant is presumed to be innocent, and that the burden is on the State to prove that he is guilty, and before he goes to trial that presumption stays with him. And I believe Mr. Karr discussed this with you.

A. Yes, sir, it stays with him and not necessarily

with me.

Q. You do not believe or presume this man to be innocent?

A. Well, sir, I don't - I didn't understand the question.to be that. As I understood the question was could I render a fair and impartial verdict.

Q. All right. Of course, I probably am phrasing it somewhat differently than what Mr. Karr did. So just listen to what I am saying. Of course, just listen to my question and just answer it the best you can. And I am asking you at this time if you feel that you can presume the defendant innocent at this time?

A. No, sir.

Q. You do not?

A. No, sir.

MR. SETTLE: Your Honor, I am going to present this man for cause.

THE COURT: All right, let me ask him. Under the law of this state every defendant in a criminal case is presumed to be innocent, and as you have heard several times the burden is upon the State to prove the guilt of any defendant beyond a reasonable

doubt. This presumption of innocence is actually evidence in behalf of the defendant, and stays with him until such time as the State is able to overcome their presumption and prove his guilty beyond a reasonable doubt. Now the Court tells you that that is the law, and that he is presumed to be innocent, and if you feel - and he is entitled to that presumption under the law. Now, if you honestly feel like you cannot presume his innocence the, of course, that is what we need to know. And if you feel like knowing that is the law, could you then follow the Court's instructions that that is the law, or do you feel like under the situation you could not presume his innocence at this time?

A. May I speak freely?

THE COURT: Yes, you man.

A. Well, let me then just discuss it with you, if I may. To be honest, I feel within myself that the defendant is guilty. It is hard to put that aside. But as to the question, yes, I can be

impartial, but the courts may assume his innocence, in other words, until he is proven guilty, but if he has already been tried and according to the evidence that I have heard and seen on television, I don't believe that I could honestly say that he is innocent, but I can be impartial. Am I clear?

THE COURT: Yes. But would the fact that he has been tried in Sebastian County and convicted by a jury up there, do you honestly feel that that would, that you would give that any weight or consider that in determining his guilt in this trial?

A. No, sir, it would have to be on the evidence presented here.

THE COURT: Now I know you are being entirely honest, and that is what I want you to be. But the Court will even instruct the jury at the close of the trial that under the law this defendant is presumed to be innocent, and it is evidence in his behalf, and he has no burden at all in this case.

Can you accept that as being the law and this defendant as he sits here now is innocent and will remain innocent under the law until such time as the State is able to prove his guilt beyond a reasonable doubt? If you can't, it is understandable. But if you can, that is what we need to know. Are you going to require him to establish his innocence?

A. Oh, no, sir.

THE COURT: You would not do that at all?

A. No, sir.

THE COURT: So would you put the entire burden on the State?

A. Yes, sir, that's where it belongs.

THE COURT: If he did not produce any evidence in his behalf, or any proof, would you hold him responsible, or would you look to the State to prove his guilt?

A. As I understand it, Your Honor, it is the State's burden to prove his guilt, and that then would be what I render a verdict on.

THE COURT: You don't have any problem about that, and you will place the burden on the State of Arkansas?

A. Oh, yes, sir.

THE COURT: Well, of course what we are back to again now, is can you in the starting out of the trial take the presumption that this man is innocent until he is proven guilty?

A. Well, I will state it this way, Your Honor. I think personally within myself, I think he is guilt. But yes, I can be impartial. Now, I don't know how we can resolve that.

THE COURT: Well, of course, as both of the attorneys have told you, the fact that you have an opinion at this time as to his guilt or innocence does not disqualify you as a juror. The test is whether or not you can legally lay all these matters that you think you might have read, heard or seen completely out of your mind and whatever might have occurred in the other trial, and come into this court and try this case solely upon the evidence that you would hear here.

And I believe you have answered, can you do that?

A. Yes, sir.

THE COURT: As Mr. Swindler sits here now, after I have told you what the law is, how do you regard him as far as the law is concerned? Do you regard him - I am not asking you about your opinion, but as far as the law is concerned, how do you regard him now as being innocent or guilty of this charge?

A. In the eyes of the court he is innocent.

THE COURT: In the eyes of the law?

A. Yes, sir.

THE COURT: Can you accept that?

A. Yes, sir.

THE COURT: Do you accept it?

A. Yes, sir.

THE COURT: All right, if you should be selected as a juror will you follow the Court's instructions as to that being the law in regard to him being innocent until such time as his guilt is established to your satisfaction, beyond a reasonable doubt?

A. Yes, sir.

THE COURT: Will you require the State in this trial to do that?

A. Yes, sir.

THE COURT: I believe he is good, so at this time I will overrule your motion for cause.

MR. SETTLE: Save my exceptions, Your Honor.

BY MR. SETTLE:

Q. All right, now Mr. Bricksey, I assume at this time that you presume this defendant to be innocent?

A. In the eyes of the law.

Q. Your eyes, sir?

A. Oh, no, sir.

MR. SETTLE: We are right back to the same point.

MR. KARR: Your Honor, this is a legal presumption. On the one hand, we are talking about an opinion, if it is not a fixed opinion as to guilt or innocence, he says he has got one. But on the other hand, he fully understands that the presumption of innocence is a legal presumption here. You know, to tell him that he has got to completely accept that and then set aside, he would have

no opinion, it is contradictory. And he says he understands his legal principle and he gives that and says he sees him as innocent in the eyes of the law, and he will force the State to meet its burden of proving his guilt beyond a reasonable doubt. And I think it is just the way that Mr. Settle is asking the question now. He is asking him two different questions. He is asking one question and getting an answer to another one.

MR. SETTLE: No, Your Honor, I disagree with that. I think that maybe Mr. Bricksey feels like he can accept theoretically this idea, but I don't think that practically he can accept it. I think he is being honest and truthful about it, and I feel that just does not accept that concept and practice in this case.

THE COURT: As I understand it, he has an opinion as to the guilt of this defendant. He has freely admitted that. So as far as he is concerned, that opinion

at this time, as I understand him, is that the defendant is guilt. So now we are asking him if he regards him as being innocent, and it is contradictory to that extent. He can't have an opinion that he is guilty, and at the same time say he regards him as being innocent. And them I think the question must be as to whether or not, since I have told him what the law is, is whether or not he can lay aside his opinion at this time regardless, regarding this defendant as being innocent. Now, I can't resolve it either.

MR. SETTLE: Your Honor, I think what it is, I know Mr. Brickaey has an opinion, and I believe he is honestly trying to set it aside. But I think that this answer is that he cannot really set that opinion aside, and I think that is really, he is answering that other question. And on that basis, I will submit him.

THE COURT: Well, I don't want to ride a good

horse to death, but again, do you feel that you can set your opinion aside and try this case just on the law and the evidence?

A. Well, I have worked for the school, and I have a family, and I have teenage daughters. And I am active in church work, and a lot of times you may form an opinion, but it is always my duty to listen to my daghters, and usually they may have mitigating circumstances in their lives, you know, about why they have been disobedient or haven't listened to me. But I have always tried to listen, and it is my duty to listen, especially in church affairs, and things of that nature. And even though you may form an opinion, then you are still required to listen and make a decision on the evidence. And yes, I can do that.

THE COURT: Again, I am going to overrule your motion.

MR. SETTLE: Save my exceptions.

BY MR. SETTLE:

Q. All right, Mr. Bricksey, if you were selected for the jury do you believe that this information you have, information of the defendant's past

or whatever you heard about the incident, whatever you heard about the incident, you could set that completely aside?

A. Yes, sir.

Q. You would consider only what is presented in this court?

A. Yeah.

Q. You would follow the instructions of the Court?

A. Yes, sir.

Q. All right, you feel if you were deliberating if you were selected as a jury, if you were deliberating on the case do you feel that you would be comparing whatever accounts you remember with whatever the evidence was that was presented in court?

A. No, sir.

Q. You would just examine what was presented?

A. Yes, sir.

Q. Would it take any proof from the defendant's side to get any of these media accounts out of your mind? Would you require proof?

A. I don't think they could be removed from my mind, the accounts, once it is there. Would you rephrase your question, please?

Q. All right, if you were chosen as a juror and you were deliberating on the case, if your opinions, or these accounts were getting in the way of your

deliberations, would you report that to the Court?

A. After the case has gone to the jury? Please say that again.

Q. While you were deliberating on the case would you report to the Court if these previous opinion, or these previous reports and accounts were having any impact on your deliberations?

A. Yes, sir, I guess; I am not sure how the system works. I have served on a jury before but, what do you mean?

Q. Well, I mean if your impartiality was being threatened by these previous reports and opinions if you felt you could not be fully impartial.

A. Well, my impartiality would not be threatened.

Q. All right, are you related to any police officers or know any police officers?

A. I am not related to any that I am aware of.

Q. Do you know the local officers?

A. Oh, yes.

Q. Have they ever discussed this case with you?

A. Not to my knowledge.

Q. They have never expressed an opinion to you about this case?

A. Not the local police officers, no, sir.

Q. You have not discussed this with any other police officers?

A. No, sir.

Q. Okay, so if you were chosen as a juror you would not have to explain whatever verdict or sentence you came back with to them?

A. No, sir.

Q. You would feel that you could just make a decision without worrying about what somebody else would think?

A. That is the way it has always been.

Q. Now I am not sure, did you tell me where you were working? I think I may have missed that. Where did you say you were working?

A. I am a house painter and repairman.

Q. Yes, you did tell me that.

A. My wife and I.

Q. Now then the testimony may warrant the evidence and testimony presented in court may warrant that the Judge, the Court will instruct you on what are called lesser included offenses. Lesser included offenses of the homicide statutes. The most serious one is the one that the defendant is charged with, and it is capital felony murder. Lesser charges would be first degree murder, second degree murder or manslaughter. It would of course depend on what

the Court would feel would be appropriate. Now if the Court instructed you on these lesser offenses do you believe that you could consider them?

A. Yes, sir.

Q. I know Mr. Karr also discussed with you the procedure involved in one of these capital felony cases. Now I am just assuming for the purposes of this question, this is sort of hypothetical, but I am assuming that if you were selected for the jury, and assuming that the jury found the defendant guilty; now of course without having any of the evidence presented in court, without knowing what the State's case is going to be in court, do you feel that you could consider the penalty of life without parole as an alternative to the death penalty? Those are the two possible penalties in a case like this. The death sentence of life without parole. Do you feel you could consider life without parole?

A. Yes, sir.

Q. Do you feel you consider it equally with the death penalty?

A. Yes, sir.

Q. All right, now, referring to the police officers, I want to say that we anticipate that the State

will call some police officers to testify. Do you feel that you would weigh their testimony over a private citizen's, or would you weigh them equally?

A. Equally.

Q. You would weigh them equally; you would not give any greater weight to any person's testimony?

A. No, sir.

Q. Have you ever been a witness or a victim of a crime, or has any member of your family ever been a witness or a victim of a crime?

A. No, sir.

Q. All right, now do you feel if you were, assuming you were selected for the jury, when deliberating on a possible verdict, or a possible sentence that you could set aside whatever background information you had about the defendant and just concentrate on what is presented in court?

A. Yes, sir.

Q. Do you know of any reason why you could not give this defendant a fair trial on this case, along with the State?

A. No, sir.

MR. SETTLE: That's all.

MR. KARR: Mr. Bricksey is good for the State.

MR. SETTLE: Your Honor, I would like to resubmit him for cause. I believe he knows too much about the defendant's background, and I believe he has stated that he has a solid opinion in this case, and I believe his answers are contradictory on that basis, and I move he be excused by the Court.

THE COURT: I want to ask you about three more questions, and then I believe we can dispose of you one way or the other. You stated awhile ago that when I asked you in regard to the presumption of innocence, you said that under the law you could regard him as being innocent.

A. Yes, sir.

THE COURT: You also stated, of course, that you have an opinion at this time as to his guilt.

A. Yes, sir.

THE COURT: All right, you have answered and said that you could and would set that opinion aside if you should be selected, and that you would be able to, and would try the case

solely upon the evidence here in court?

A. Yes, sir.

THE COURT: Can you and will you follow the instructions of the Court as to what the law of this state is, and be bound by whatever instructions the Court gives you, whether you agree with them or not, if the Court tells you that is the law?

A. Yes, sir.

THE COURT: Will you do that, and can you do that?

A. Yes, sir.

THE COURT: All right, your motion for cause will again be overruled.

MR. SETTLE: Note my exceptions, Your Honor. Your Honor, he is excused.

THE COURT: All right, let's take our noon recess. Court is in recess until 1:30.

(The time now being 1:30 p.m. court is reconvened from the noon recess)

VOIR DIRE EXAMINATION OF R. C. MAXWELL

BY MR. KARR:

Q. Mr. Maxwell, do you know anything about the facts of this case?

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

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NO. 80-5488

JOHN EDWARD SWINDLER — Petitioner

v.

STATE OF ARKANSAS — Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

# BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

I. Whether petitioner was sentenced to death by a jury chosen in violation of the constitutional standards provided in Witherspoon v. Illinois, 391 U.S. 510 (1968)?

II. Whether petitioner was sentenced to death in violation of his Eighth and Fourteenth Amendment guarantees to due process because he was denied the opportunity to present mitigation evidence when the trial court denied his request for a continuance?

III. Whether petitioner was denied his right to trial by a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments in that three jurors seated acknowledged that they had at one time formed opinions regarding petitioner's guilt?

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## OPINIONS BELOW

The opinion of the Arkansas Supreme Court affirming petitioner's conviction is reported at Swindler v. State, 267 Ark. Adv. Sh. 418, 592 S.W.2d 91 (1979). That opinion is reproduced in slip form in the petitioner's appendix at A-1.

## JURISDICTION

The petitioner has adequately set forth the jurisdictional grounds. As this case involves the imposition of the death penalty, respondent waives its right to oppose the petition on the grounds that it is untimely filed.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional provisions were stated by petitioner.

> Ark. Stat. Ann. §43-1706 (Repl. 1977). Civil procedure applicable. -- The provisions of the Code of Practice in civil actions, in regard to postponements of the trial of actions, shall apply to the postponement of prosecutions on behalf of defendants.
>
> Ark. Stat. Ann. §27-1403 (Repl. 1979). Continuance for absence of evidence or witness -- Requisites of motion -- Admission as to testimony of absent witness to prevent continuance. -- A motion to postpone a trial on account of the absence of evidence shall, if required by the opposite party, be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it; and if it be for an absent witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, that the affiant himself believes them to be true, and that the witness is not absent by the consent, connivance, or procurement of the party asking the postponement. If thereupon the adverse party will admit that on trial the absent witness, if present, would testify to the statement contained in the application for a continuance, then the trial shall not be postponed for that cause. Provided, the opposite party may controvert the statement so set forth in the said motion for continuance by evidence.
>
> Ark. Stat. Ann. §41-1304 (Repl. 1977). Mitigating circumstances. -- Mitigating circumstances shall include, but are not limited to the following:

(1) the capital murder was committed while the defendant was under extreme mental or emotional disturbance;

(2) the capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;

(3) the capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect, intoxication, or drug abuse;

(4) the youth of the offender at the time of the commission of the capital murder;

(5) the capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;

(6) the defendant has no significant history of prior criminal activity.

## STATEMENT OF THE CASE

Although petitioner's statement of the case is remarkably self-serving, it adequately apprises the Court of the context in which the issues arose.

## SUMMARY OF RESPONDENT'S ARGUMENT

I.

While Murl Carmack gave the equivocal replies quoted by petitioner when questioned about his feelings and beliefs regarding the imposition of the death penalty, he clearly replied unequivocally that he would not, under any set of facts or circumstances, consider or impose the death penalty, no matter what the law might be. He was thus properly excused under the standard of Witherspoon v. Illinois, 391 U.S. 510 (1968).

II.

Both this Court and several state supreme courts have addressed the issue of what evidence is material and relevant when offered in mitigation by a defendant in a capital case. The evidence proffered by petitioner was neither material nor relevant under the holdings of these cases, as the testimony of the proffered witness related neither to the petitioner himself nor to the crime with which he was charged. The witness would merely have testified that electrocution is cruel and unusual punishment and that some convicted murderers who did not receive the death penalty were later rehabilitated.

The trial court did not err in refusing to grant a continuance in order that petitioner might present this witness at the sentencing hearing, as the testimony he proffered regarding electrocution related to an issue already decided as a matter of law, and the evidence regarding rehabilitation was neither relevant nor material. Petitioner thus had no constitutional right to present the testimony at issue.

III.

The three jurors challenged for cause because they had formed some opinion as to petitioner's guilt were properly seated after each stated that he would set aside any prior opinion formed, listen to the evidence presented, and decide the case based only on what he saw and heard in the courtroom. There was no showing of prejudicial pretrial publicity necessitating strict scrutiny of the jurors' responses on this issue.

## REASONS FOR DENYING THE WRIT

I. JUROR MURL CARMACK WAS PROPERLY EXCUSED FOR CAUSE BECAUSE HE STATED UNEQUIVOCALLY THAT HE WOULD NEVER CONSIDER OR IMPOSE THE DEATH PENALTY.

Petitioner's argument on this point is misleading, and his statement of Juror Murl Carmack's position is blatantly self-serving.

It is true, as petitioner states, that Carmack gave several imprecise answers on voir dire as to his willingness or ability to impose the death penalty.

Petitioner has also correctly stated the law with regard to the restrictions placed on the trial court in excusing prospective jurors for cause under Witherspoon v. Illinois, 391 U.S. 510 (1968), and its progeny, so respondent will not reiterate that standard here.

Petitioner apparently bases his argument on Mr. Carmack's statements that he "wouldn't think" the death penalty is proper punishment for some crimes; that he "wouldn't want to" vote for the death penalty; and that he didn't "think (he) would" vote for the death penalty, no matter what the facts or the law. Even though the responses were somewhat weak, it should be noted that Mr. Carmack never indicated in any way whatsoever that he might consider or impose the death penalty.

Petitioner has conveniently omitted, however, the unequivocal answers Carmack gave when the prosecutor refused to accept these earlier replies, which could be termed no more than statements of Carmack's beliefs and feelings. Standing alone, these responses would make Mr. Carmack's exclusion for cause highly suspect under Witherspoon.

The dispositive portion of the voir dire examination is as follows:

MR. KARR: (prosecuting attorney) : So are you telling me that no matter what the facts are, or what the law is, that you would not vote for the death penalty?

MR. CARMACK: No, I don't think I would.

MR. KARR: Okay, now you say you didn't think you would. Can you tell me for sure that you would or would not?

MR. CARMACK: Well, I wouldn't then, I will put it that way.

MR. KARR: No matter what the facts were, or what the law was, you would not vote for the death penalty?

MR. CARMACK: No, I don't believe I could, and then have a clear conscience.

THE COURT: Now, what he has asked you is, and I want to ask you, too, to be sure that I understand. Is that feeling that you have or your belief so fixed and strong that regardless of what the facts might be, regardless of how bad they might be, or how aggravating they might be, in any case, that under no circumstances could you consider imposing the death penalty?

MR. CARMACK: I wouldn't. (T. 1446-1448) [Emphasis added.]

It is hard to imagine how much more forcefully or clearly Mr. Carmack could have answered. When required to state what he would do, rather than how he felt or believed, he stated unequivocally that he would never, under any conceivable fact situation, no matter what the law is, consider or vote for the death penalty.

It is clear from the opinion of the Arkansas Supreme Court that it relied on the same responses emphasized here by respondent in holding that Mr. Carmach was properly excused for cause. Swindler, 267 Ark. Adv. Sh. at 429-30, 592 S.W.2d at 97.

It would seem that Mr. Carmack is exactly the kind of juror that this Court found excusable for cause in Witherspoon. This Court should therefore deny the petition for writ of certiorari on this issue because Mr. Carmack was properly excused for cause under the standard clearly set by this Court in Witherspoon, and no error was committed in the trial court's doing so.

II. PETITIONER WAS NOT CONSTITUTIONALLY ENTITLED TO A CONTINUANCE TO PRESENT THE EVIDENCE HE PROFERRED IN MITIGATION, AS THAT EVIDENCE WAS IRRELEVANT AND IMMATERIAL.

Petitioner alleges that he suffered a constitutional deprivation because the trial court denied his motion for continuance to secure the presence of a witness who would allegedly testify at the sentencing phase of the trial that electrocution is a cruel and inhuman method of inflicting the death penalty and that some persons convicted of capital crimes have been rehabilitated.

The witness was Don Reid, Jr., a publisher and former newspaper reporter who, according to his testimony at a trial in Georgia, had witnessed 189 executions in Texas. (T. 642-644)

When appellant made his motion for witness fees for the witness (T. 241-243), the court held a hearing and received into evidence a transcript of the Georgia proceedings in which Reid testified about the effects of electrocution on a human body. (T. 640-659) The court took both the motion to pay the witness fee and the evidence under advisement. (T. 669)

Reid was scheduled to testify, but when the trial was delayed, petitioner alleged that he could not be present at the time the sentencing stage would begin. Petitioner then moved the court for a continuance so that the witness would be available. (T. 1830-1835) The court took the motion for continuance under advisement, and, before the sentencing stage began, denied the motion because it had "serious reservations as to the competency of the type testimony" (T. 2183); it did not feel "that his is the type testimony that would be admissible as mitigating circumstances under the law of this state" (T. 2184); and it felt "that whether it is cruel and unusual punishment is more a question of law," and Reid's "opinion or reactions. . . would (not) be proper to be shown as a mitigating circumstance." (T. 2185).

Ark. Stat. Ann. §43-1706 (Repl. 1977) provides that the provisions for postponements in civil actions shall apply to postponement of criminal prosecutions requested by a defendant. Ark. Stat. Ann. §27-1403 (Repl. 1979) applies when a continuance is requested because of the absence of evidence or a witness. It requires a showing of both materiality of the evidence and due diligence in obtaining it. It also requires that the movant show by affidavit what facts the witness will prove, that the affiant believes them to be true, and that the witness is not absent by the consent, connivance or procurement of the movant. See Venable v. State, 260 Ark. 201, 538 S.W.2d 286 (1976); Thacker v. State, 253 Ark. 864, 489 S.W.2d 500 (1973).

The issue presented here was raised by petitioner in his direct appeal to the Arkansas Supreme Court, Swindler v. State, 267 Ark. Adv. Sh. 418, 592 S.W.2d 91 (1979). That court held that the granting or denial of a continuance is within the trial court's discretion and will be set aside only if it found an abuse of discretion; it

found no abuse of discretion in this case. The court addressed the substance of Reid's proferred testimony only on the issue of electrocution as a means of execution, holding that petitioner's argument was misplaced:

> [W]hether death by electrocution is cruel and unusual punishment is a question of law and not of fact; nor is it a circumstance to be considered when a jury deliberates on mitigating circumstances. It is not up to the jury to decide how a defendant dies. Death by electrocution has been decided by the General Assembly as the means of execution in such cases. Ark. Stat. Ann. §43-2611 (Repl. 1977).

Swindler, 267 Ark. Adv. Sh. at 433, 592 S.W.2d at 98.

The court dealt further with the substantive issue, noting that it had previously upheld the trial court's finding, after hearing evidence presented by the defendants, that death by electrocution is not cruel and unusual in Ruiz & Van Denton v. State, 265 Ark. 875, 894-95, 901, 582 S.W.2d 915, 928 (1979). Swindler 267 Ark. Adv. Sh. at 431, 592 S.W.2d at 98. See also Collins v. State, 259 Ark. 8, 531 S.W.2d 13 (1975), vacated for reconsideration, 429 U.S. 808 (1976), reconsidered at 261 Ark. 195, 548 S.W.2d 106 (1977), cert. denied, 434 U.S. 878 (1978).

The Arkansas Court's holding with regard to the continuance is consistent with Arkansas case law. See Grigsby v. State, 260 Ark. 499, 542 S.W.2d 275 (1976); Venable v. State, 260 Ark. 201, 538 S.W.2d 286 (1976), both of which involved capital murder convictions.

The Arkansas Court has also squarely held that the State is under no obligation to bring in an expert witness, at its expense, to testify on behalf of a defendant that death by electrocution is cruel and unusual punishment. This is especially true, when, as here, the trial court allowed the expert witness' testimony, given in another case, to be introduced and considered by the court. Ruiz, 265 Ark. at 894, 582 S.W.2d at 928.

The Arkansas Court's holding with regard to the trial court's discretion in granting or denying a continuance is

also consistent with decisions of this Court. See, e.g., Ungar v. Sarafite, 376 U.S. 575, 589 (1964); Avery v. Alabama, 308 U.S. 444, 446 (1940).

The Arkansas Court's holding with regard to the issue of the means of imposition of the death penalty also comports with the decisions of this Court, which discussed in detail the deference given to state legislative policy in imposing the death penalty in Gregg v. Georgia, 428 U.S. 153, 175-86 (1976). In that case, this Court repeatedly noted that legislative policy is interpreted to reflect the community standards, moral values and will of the people. 428 U.S. at 175, 177, 181, 186-87.

This Court upheld the constitutionality of electrocution as a means of inflicting capital punishment almost a century ago in In re Kemmler, 136 U.S. 436, 447-49 (1890). See also Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947). That holding was at least impliedly reiterated as late as 1976 in Gregg, 428 U.S. at 178.

Petitioner alleges that it was also error of constitutional magnitude for the trial court to refuse to allow Reid's testimony with regard to the rehabilitation of some persons convicted of capital crimes. His argument might arguably have some merit were he able to allege that Reid would have testified that petitioner himself could be rehabilitated. That is not the issue, however, and there was no showing that Reid knew anything about petitioner or the circumstances of his crime.

The substance of Reid's proferred testimony can only be deduced from the Georgia transcript introduced at the pretrial hearing. (T. 641-659) Reid testified that he had had occasion, as a newspaper reporter, to observe subsequent proceedings involving defendants convicted of first degree murder and not sentenced to death. His testimony was obviously limited to his experiences in

Texas, and he apparently testified that while some 34 defendants were paroled and were "serving society well," he also noted that some paroled murderers later committed other acts of violence and that at least two committed heinous crimes while on parole.

There is considerable doubt that Reid qualified as an expert witness with regard to the rehabilitation of convicted murderers in view of his limited experience in such cases. Even if he had, however, the trial court was not required to admit such testimony either under the applicable Arkansas statute or under the decisions of this Court.

Ark. Stat. Ann. §41-1304 (Repl. 1977) provides for six specific mitigating factors which can be considered by the jury during the sentencing phase. It also explicitly permits other evidence to be offered in mitigation by not limiting such evidence to the six enumerated factors. The Arkansas Supreme Court has clearly held that mitigating factors not enumerated in the statute are admissible, even under the former statute, which did not contain the language allowing additional evidence. See Hulsey v. State, 261 Ark. 449, 549 S.W.2d 73 (1977), cert. denied, 439 U.S. 882 (1978); Collins v. State, 261 Ark. 195, 210 n. 6, 548 S.W.2d 106, 114 n. 6, cert. denied, 434 U.S. 878 (1977).

While respondent could find no Arkansas cases specifically holding what additional types of evidence may be introduced in mitigation under the language of §41-1304, both this Court and other state courts have addressed this issue.

Although petitioner cites Gardner v. Florida, 430 U.S. 349 (1977), and Lockett v. Ohio, 438 U.S. 586 (1978), in support of his proposition that action which resulted in the exclusion of the proffered evidence here is a violation of his constitutional rights, those cases are of no assistance to him on this issue.

In Gardner the jury found that the mitigating circumstance outweighed the aggravating circumstances and recommended the imposition of a life sentence. The trial judge, after reviewing a confidential presentence report, part of which was never shown either to the prosecutor or to the defendant and was never read into the record, instead imposed the death penalty. The unconstitutional actions involved the imposition of the death penalty because of factors which were never revealed to the defendant and against which he could not defend himself. Although petitioner quotes dictum from Gardner which refers to the possibility of rehabilitation, it obviously referred specifically to consideration of factors regarding the rehabilitation of that particular defendant, and the Court did not hold that even those factors must be considered.

In Lockett, the Court held that a state statute imposing the death penalty may not limit the consideration of relevant mitigating factors. Since the Arkansas statute specifically allows the introduction of evidence to prove mitigating factors not specifically enumerated, Lockett is obviously not on point here.

It is highly significant that this Court's holdings and dicta with regard to mitigating circumstances uniformly refer to evidence relevant to the particular defendant and to the crime for which he is being tried. This Court has never held that a defendant is entitled to present evidence on any issue he chooses and call it evidence of a mitigating factor.

This Court began close scrutiny of state statutory provisions with regard to mitigating factors in 1976. In Woodson v. North Carolina, 428 U.S. 280, 304 (1976), (Stewart, Powell, Stevens, JJ., concurring), it was stated:

> [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment. . . requires consideration of the character and record of the

> individual offender and the ciroumstances of the particular offense as a constitutionally indispensable part of the process inflicting the penalty of death. (Citation omitted.)

In Proffitt v. Florida, 428 U.S. 242 (1976), the Court upheld the constitutionality of Florida's statute governing the consideration of mitigating circumstances. It also cited with apparent approval the Model Penal Code provision, 428 U.S. at 250 n. 5. It is interesting to note that the only subsection of that provision apparently not included in the Florida statute, subsection (c) regarding the consent of the victim, is also the only one not included in the Arkansas statute. Apparently the Florida statute did not have the language included in the Arkansas statute which permits consideration of other mitigating factors. In discussing the constitutional requirements for consideration of mitigating factors, the Court noted that a statute must cover factors "relevant to sentencing" and must include "matters relating to certain legislatively specified aggravating and mitigating circumstances." 428 U.S. at 248. It noted further that the Florida statute "focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed." 428 U.S. at 258.

The Court quoted Woodson and specifically enumerated circumstances which must be considered in Roberts v. Louisiana, 431 U.S. 633, 637 (1977) (per curiam):

> Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.

Although the Court did not imply that this was an exhaustive list and respondent would not presume to infer that it is, the Court further clarified the constitutional requirements by holding that a state must allow "consideration of whatever mitigating circumstances may be relevant

to either the particular offender or the particular offense." 431 U.S. at 637 (emphasis added).

Similarly, the Court held in Gregg, 428 U.S. at 192, that sentencing problems can be alleviated if the jury "is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." (Emphasis added.) In upholding the Georgia statutory scheme, the Court referred with approval to a requirement that the jury "consider the circumstances of the crime and the criminal before it recommends sentence," focusing attention on the "characteristics of the person who committed the crime." 428 U.S. at 197. It also noted that procedures held unconstitutional in Furman v. Georgia, 408 U.S. 238 (1972), "were not directed to give attention to the nature or circumstances of the crime committed or to the character or records of the defendant." Gregg, 428 U.S. at 206.

In Lockett, the Court reiterated its holding in Woodson and noted that it was faced in Lockett with the specific question it had not answered in Woodson: "which facets of an offender or his offense it deemed 'relevant' in capital sentencing or what degree of consideration of 'relevant facets' it would require." It specifically held:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, (emphasis in the original) any aspect of a defendant's character or record and any of the circumstances of the offense (emphasis added) that the defendant proffers as a basis for a sentence less than death.

Lockett, 438 U.S. at 604.

Several state supreme courts dealing with this issue have consistently held that evidence offered in mitigation must be relevant to the defendant himself or to the crime at issue. The two most nearly on point here are Franklin

v. State, 245 Ga. 141, 263 S.W.2d 666 (1980), and Irving v. State, 316 So.2d 1360 (Miss. 1978), cert. denied, 441 U.S. 913, (1979).

In Franklin, the defendant intended to offer as witnesses a reporter, a prison chaplain and a professor of religion who had testified without objection in Davis v. State, 241 Ga. 376, 387, 247 S.E.2d 45, 52 (1978). When the State objected at defendant's trial, the trial court held an in camera hearing to review the testimony and ruled it inadmissible because it related to the death penalty in general and not to the particular defendant. The Georgia Supreme Court upheld the trial court and held that "descriptions of executions and of life on death row, statistics relating to executions, and religious and philosophical approaches to the death penalty" are not relevant as mitigating evidence. Franklin, 263 S.W.2d at 672-73.

The defendant in Irving proferred the testimony of a preacher who apparently testified in camera "about his finding on various studies concerning the effect and imposition of the death penalty, and that even after Furman v. Georgia, 408 U.S. 238 (1972), the death penalty is still applied cruelly and arbitrarily." Irving, 361 So.2d at 1372. The Mississippi Supreme Court upheld the trial court's exclusion of the testimony, citing Jackson v. State, 337 So.2d 1242, 1254, (Miss. 1976), in which the court held:

> We now hold that at the sentencing hearing, the defendant may introduce competent evidence relevant to the determination of punishment, even though such evidence might not have been admissible on the question of his guilt. He may prove his lack of a prior criminal record and may introduce such other evidence of his character or the particular circumstances of his crime that would be relevant in deciding whether he should be sentenced to death or life imprisonment.

Similarly, in Bishop v. State, 95 Nev. 511, 516, 597 P.2d 273, 276 (1979), the Nevada Supreme Court stated in dictum that the defendant "must be given the opportunity

to present evidence of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense before a death penalty can be imposed," citing Lockett, Roberts and Woodson.

In Coppola v. Commonwealth, 220 Va. _____, 257 S.E.2d 797 (1979), cert. denied, 444 U.S. 1103, (1980), the Virginia Supreme Court upheld the trial court's exclusion of two different categories of evidence offered in mitigation-- evidence of the effect of the defendant's arrest and prosecution on his children and evidence that a co-defendant or accomplice had been convicted of the same capital murder and sentenced to life imprisonment. Noting that a Virginia statute governing the admissibility of mitigating evidence vests discretion with the trial court, subject to the rules of evidence governing admissibility, the court held that the evidence with regard to the effect on the defendant's family is

> not analogous to any of the evidence specifically approved by the statute. The kind of evidence therein contemplated bears upon the record of the defendant and the atrociousness of his crime. Evidence of a previous good record, and extenuating circumstances tending to explain, but not excuse, his commission of the crime, is admissible mitigating evidence for the jury to consider in determining whether the defendant will probably be a continuing serious threat to society, or whether his conduct in committing the murder was outrageously or wantonly vile, horrible or inhuman. But the effect of his incarceration upon relatives is not a mitigating circumstance for the jury to consider.

Coppola, 257 S.W.2d at 804.

With regard to the evidence of the other defendant's conviction, the court held that the jury is required to consider

> evidence in mitigation of the offenses relevant to the defendant's past record and the nature of his conduct in committing the crime. Evidence as to the result of another defendant's trial for the same crime is irrelevant to the determination by the jury of the appropriate punishment for the defendant whose sentence is being weighed.

257 S.W.2d at 805.

The trial court's refusal to grant a continuance in this case is tantamount to the exclusion of the evidence proffered by petitioner in the form of a transcript of the witness' testimony in a prior proceeding in another state. This would only have been error if petitioner was constitutionally entitled to present such testimony at the sentencing hearing. It is clear from the cases cited above that the type of general evidence about electrocution as a means of inflicting capital punishment and about rehabilitation of murderers in general is not the type of evidence which a defendant is constitutionally entitled to present. There was no showing that the witness knew anything about the petitioner or about the nature of his crime. There was thus no error of constitutional magnitude.

The Court should deny the petition for writ of certiorari because it has consistently and repeatedly held, at least by implication, that a defendant in a capital case is only entitled to present evidence in mitigation which is relevant either to the defendant himself or to the crime at issue. It has also clearly held that electrocution as a means of inflicting capital punishment is constitutionally permissible and is a matter for legislative determination. The holding of the Arkansas Supreme Court that the trial court did not err in denying the continuance is thus in keeping with this Court's prior decisions, as petitioner was not denied his constitutional right to present relevant evidence of mitigating factors during the sentencing phase of his trial.

The Court should thus deny the petition for writ of certiorari because this Court has already decided the question presented, and both the trial court and the Arkansas Supreme Court ruled in accordance with this Court's prior decisions.

III. PETITIONER WAS TRIED BY A FAIR AND IMPARTIAL JURY BECAUSE THE THREE JURORS CHALLENGED HERE WERE QUALIFIED TO SERVE UNDER PRIOR DECISIONS OF THIS COURT.

Petitioner alleges in his third argument that he was denied a trial by a fair and impartial jury because pretrial publicity resulted in the formation of opinions as to his guilt by prospective jurors. He further alleges that three jurors who were seated were aware that petitioner had previously been convicted of the same crime and had information about his background, including allegations that he had committed other crimes.

Respondent will rely here on the fact that this issue was decided correctly by the Arkansas Supreme Court, which based its opinion primarily on this Court's holding in Murphy v. Florida, 421 U.S. 794 (1975). In fact, the Arkansas Court's review of this issue is presented both succinctly and comprehensively, both as to the facts of this case and the applicable law, and respondent will quote salient portions of that opinion as the most expedient method for disposing of petitioner's argument here.

> The United States and Arkansas constitutions entitle a defendant to a fair trial. If, because of pretrial publicity, an impartial jury cannot be seated to try a defendant, his right to a fair trial is violated. Irvin v. Dowd, 366 U.S. 717 (1961); Swindler v. State, supra; Ruiz & Van Denton v. State, 265 Ark. 875, 582 S.W.2d 341 (1979).
>
> Swindler's first argument is that, in Scott County, he could not be tried by an impartial jury.
>
> While Swindler's counsel moved six times for a mistrial or change of venue during the 5 days' voir dire examination, no evidence at all was offered of pretrial publicity. No affidavits or testimony, showing pretrial publicity or ill feelings in the community as a result of the killing, was offered, as they had been in Swindler v. State, supra or Ruiz & Van Denton v. State, supra.
>
> Our law provides affidavits or sworn testimony must be offered to support a motion for a change of venue. Ark. Stat. Ann. §43-1502.
>
> The only evidence we have of prejudicial pretrial publicity is the voir dire testimony of the prospective jurors as 120 jurors were examined. Swindler had not exhausted his peremptory challenges until after the 11th juror had been selected.

The trial court, no doubt mindful of our decision in the first Swindler case, was careful and took pains in selecting this jury.

The fact 120 were examined is not, standing alone, enough to conclude a fair and impartial panel could not be seated.

The judge excluded over 79 people for cause. The jurors seated, while in some instances acknowledging that they knew generally of the crime, Swindler, or the first trial, all said they could set aside what they had heard and try Swindler on the facts and according to the law.

The test of whether pretrial publicity has prejudiced a juror was set forth in Irvin v. Dowd, supra. It reads:

> It is not required that the jurors be totally ignorant of the facts involved. . . To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented at court. 366 U.S. at 722-723.

Deciding to seat a juror challeged for bias is a discretionary matter with the trial judge. To reject a potential juror, the judge must be satisfied that the juror's state of mind is such that he cannot render an impartial judgment and that seating him will result in substantial prejudice to the rights of the defendant. Jones v. State, 264 Ark. 935, 576 S.W.2d 198 (1979).

Swindler's attorney did not move to strike 9 of the jurors selected. One was overseas at the time of the killing; another had read or heard nothing of the case, except from her husband; one knew nothing of the facts but only vaguely recalled "something" about it; another had read, some three weeks before this trial, the local paper in Scott County about the killing; one recalled some news account and probably decided Swindler was guilty because he had been found guilty before; one had seen a "little bit" on T.V. and read in the local paper that a Fort Smith policeman was shot. Another had heard nothing and knew nothing. All of these were selected with no objection. The last juror selected, who knew nothing, was selected after the defense had exercised all the peremptory challenges.

The three jurors selected, that the defense challenged for cause, were all selected when the defense had remaining a peremptory challenge. These three did admit to having more knowledge than the others.

Thurman Jones had read the Fort Smith newspapers and seen the "case on T.V." He also read that Swindler was accused of killing two others in South Carolina. He had assumed Swindler was guilty since he had been convicted. Jones was questioned extensively. He acknowledged he could set aside all his ideas and information and give Swindler a fair trial.

Milton Staggs had read and heard some about the case and had formed a "little bit" of an opinion. He said he would have no difficulty in setting aside any information or opinion he had formed.

Henry Sunderman had read and heard of the case. He declared he had no opinion about the case. Since a jury had convicted Swindler before, he had to conclude Swindler might well be guilty. But he said he could do his duty in this case and disregard any information he had about the case.

The judge, in his discretion, decided these jurors could serve. We cannot say the judge clearly abused his discretion in selecting these jurors.

There is no comparison at all between this case and the first Swindler case and the Ruiz & Van Denton case. The appellant cites as controlling the cases of Irvin v. Dowd, supra, and Sheppard v. Maxwell, 384 U.S. 333 (1966), the case involving Dr. Sam Sheppard. In both Irvin and Sheppard there was strong evidence of pretrial publicity that prevented the selection of a fair jury. As we indicated there was no such evidence offered in this case. The only real argument the appellant has is that over 80% of those questioned were excused for cause.

We have independently examined the voir dire, as we are required to do in such cases. We find that the facts in Swindler's second trial regarding the composition of the jury are not unlike those that were found to exist in the case of Murphy v. Florida, 421 U.S. 794 (1975). In the Murphy case the Court also found that a considerable number of jurors knew of Murphy's crimes and his past crimes. However, the Court did not find that such information alone required a reversal of Murphy's conviction. The Court compared the difference between Murphy's case and that of Irvin v. Dowd, supra. The Court stated:

> The voir dire in this case [Murphy's] indicates no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside. ...

Applying the tests we have recited, we must conclude that the appellant has not demonstrated such prejudice in the community nor bias on the part of the juror that would require a new trial.

* * *

The third argument has no merit. The single fact that over 80% of the jurors questioned were excused for cause is not sufficient to find that a mistrial should have been granted or change of venue ordered. That is only one consideration. The judge and lawyers spent 5 days selecting a jury. Except for the three jurors objected to, it can hardly be argued the jury was unacceptable. The fact the defense had to use its preemptory challenges (as did the State) is no reason to find a jury could not be seated.

Swindler, 267 Ark. Adv. Sh. at 424-28. (The slip opinion in found in petitioner's appendix at A-1.)

Again, as in his Point I, petitioner has indulged in emphasizing the statements made by prospective jurors which are favorable to his position and had omitted or only casually mentioned the more definite statements which rendered them qualified to serve. For this reason, respondent feels compelled to summarize more fully the voir dire examination of the three jurors.

The second juror seated was Henry Sunderman. On direct examination he stated that he knew a little bit about the facts of the case (T. 971) but that he did not have an opinion about it (T. 972). He stated that he would make his decision based on the facts, that he would not require petitioner to put on any evidence to prove his innocence and that he would "leave the entire burden with the State." (T. 973)

On cross-examination Mr. Sunderman remembered that an altercation took place at a service station and remembered the names of the victim and petitioner from television news accounts (T. 975). He remembered that petitioner was from North or South Carolina and that there were some sort of assault charges brought against him in that state. He didn't remember anything other than that. He stated that people had been convinced (of petitioner's guilt) after the first trial (T. 977) and that the majority had felt he was guilty. At that time he was of the opinion that petitioner was guilty but that was not his opinion at trial (T. 978). At trial he would base his opinion on the evidence that was presented. He felt that the first jury had made its decision on the facts that were presented to them (T. 979). He felt that if he sat on the jury it would be his duty to make his decision based on the facts presented to him, not on what had been presented somewhere else and stated that he would not consider what another jury had considered nor what their verdict was. (T. 980) He said he could listen to the evidence presented in court

and not consider the other evidence because he didn't remember what the evidence had been (T. 981). He said he could find for the petitioner if the State had not proved to him beyond the "shadow of a doubt" that petitioner was guilty (T. 982). He said he would consider in his deliberations all the possibilities of lesser included offenses, (T. 983) and he would weigh equally both the death penalty and life without parole if petitioner were found guilty of capital murder. He would not give more credence to a policeman's testimony than to that of an ordinary citizen (T. 984).

Petitioner objected to the court's seating Mr. Sunderman and moved that he be excused for cause because he had background information about petitioner. The Court overruled the objection, and Mr. Sunderman was seated after petitioner said, "Your Honor, he is a good juror." (T. 985) (The voir dire of Mr. Sunderman appears in the petitioner's appendix at A-22 - A-36.)

The second juror challenged here was the fourth juror seated, Thurman Jones. On direct examination by the State, Mr. Jones stated that the only thing he knew about the case he found in the newspaper and on television (T. 1146). Based on what he had heard or read he had not formed an opinion as to how the case should be decided. The only opinion he could form was that petitioner was guilty because the first jury had found him guilty. He stated that he didn't hear the evidence before so he didn't know what that jury had based its decision on. He said he could base his decision just on what happened at the second trial (T.1147). He said he was not "too hep" on the death penalty, but in certain cases he "would believe in it," although it would have to be an extreme case before he would "go for" the death penalty (T. 1148). He stated that he could follow Arkansas law and could impose the death penalty if it were called for. He did

state that since petitioner had had a trial and he knew about it, he wondered if petitioner was not going to have to prove to him his innocence (T. 1149). Later on he stated that he would hold the State to its burden and not require petitioner to present any evidence that he was not guilty (T. 1150).

On cross-examination, Mr. Jones stated that he had not read completely an account of petitioner's crime until the day before the voir dire occurred. He recalled that a police officer was shot in Fort Smith; that the suspect "took off" and was caught him in the "bottoms"; that they arrested the man, put him in jail and sent him to Little Rock for sanity tests (T. 1153). He also read that petitioner was accused of killing two teenagers in South Carolina. He said that he didn't remember discussing the case with anyone, and, if they had stated their opinion to him, it wouldn't have made any difference. In fact, he never heard anyone express the opinion that petitioner was guilty or not (T. 1154). He stated that he had formed the opinion that petitioner was guilty when he was previously convicted. Since he didn't hear any part of the testimony he couldn't say whether petitioner had received a fair trial. Regarding the presumption of innocence, Mr. Jones stated that he would base his decision on what he heard in the courtroom (T. 1155). He stated that he couldn't give petitioner the same presumption of innocence as if he hadn't already been convicted. The only thing he could assume from the conviction was that petitioner was guilty (T. 1156). He emphatically stated that he would listen to the evidence, would take what happened in the courtroom, and would follow the judge's instructions and the law without remembering all he had heard (T. 1157). He again stated that if he were on the jury he would listen to what was said and base his opinion on that, "period." He denied any knowledge of the evidence in the case (T. 1158)

and stated that if he were deliberating on the jury and could not rid his mind of something he had heard outside the courtroom, he would report it to the judge (T. 1160). He stated that he would not give police officers' testimony any more credence than an ordinary citizen's, and he would consider the lesser included offenses (T. 1161). He said he would consider both penalties and give them both equal weight. He also believed one could assert the defense of self-defense against a policeman (T. 1162). He said he could just consider the evidence and not consider anything about petitioner's background because it was just hearsay and had not been proved (T. 1163).

Petitioner objected to seating Mr. Jones because his answers were contradictory and because he had too much information about appellant's background (T. 1164). When the court overruled him, he stated, "He is good, Your Honor." (T. 1164) (The voir dire of Mr. Jones is found in petitioner's appendix at A-37 - A-55).

Milton Staggs is the third juror challenged here and was the seventh seated at trial. Mr. Staggs stated on direct examination that he had heard "a little bit" about the case from the media (T. 1222). He said he had an opinion based on what he had heard, but that it was not so fixed in his mind that he could not set it aside and base his decision on what he heard in the courtroom (T. 1223). He understood that petitioner was presumed to be innocent until he was proven guilty (T. 1226). He also said he would hold the State to its burden of proving guilt beyond a reasonable doubt and that his decision would be based on the facts either way (T. 1227). The trial court participated in the voir dire to clarify Mr. Staggs' position on these issues. (T. 1228-1230)

On cross-examination Mr. Staggs stated that he could not recall any specifics about the case, although he could remember seeing something in the media (T. 1231). After

more pointed questioning he did recall that a policeman was shot and that a suspect (petitioner) was apprehended. He continued that no one had expressed an opinion to him about how the case should be decided (T. 1232). Based on all he had heard, he said he had not formed an opinion because one could not really say something happened just because one saw it on the news (T. 1234). Based on what he had heard, he had "a little bit of an opinion" that it would have to be "like it came out." He stated it was not a fixed opinion, that he could set it aside and accept facts (T. 1235). He said he would not require any evidence from petitioner. He would listen to the evidence and not consider anything else he might have heard. He would only want to hear "what went on at the present" - he would not compare the State's evidence with what had been reported (T. 1236). He stated that he wouldn't serve on the jury if he couldn't drop his opinion (T. 1237). After questioning about lesser included offenses, police testimony and the two possible penalties, Mr. Staggs again stated that he could set aside anything he might have heard and consider only what was presented in court (T. 1239).

Defense counsel submitted Staggs for cause because he had an opinion (T. 1240). When he was overruled he stated, "Your Honor, this juror is good." (The voir dire of Mr. Staggs appears in petitioner's appendix at A-59 - A-78.)

Each of the challenged jurors testified that he would listen to the evidence and make his decision based on what he saw and heard in the courtroom. Each also stated that he could set aside any opinion he might have formed after hearing media reports about petitioner and the crime. This Court's holding in Murphy makes it clear that prospective jurors in State court trials who have learned

from news sources of the defendant's background or prior crimes are not presumed to be prejudiced. It distinguished cases such as Irvin v. Dowd, 366 U.S. 717 (1961), and Sheppard v. Maxwell, 384 U.S. 333 (1966), in which the atmosphere at trial "had been utterly corrupted by press coverage," resulting in an atmosphere likened to a circus or a carnival. Cases in which there is extremely inflammatory publicity

> cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.

Murphy, 421 U.S. at 798-99.

The test, according to this Court, is whether the totality of the circumstances indicates that petitioner's trial was not fundamentally fair. While the defendant is to be given the opportunity to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality," that burden remains on the defendant. Murphy, 421 U.S. 799-800. The Court also made it clear that it will distinguish "mere familiarity with petitioner or his past and an actual predisposition against him" and will also distinguish "factual publicity from that which is invidious or inflammatory." 421 U.S. at 800 n. 4.

This Court has held that a defendant is required to produce specific examples of the allegedly prejudicial publicity to show ill feelings in the community. Dobbert v. Florida, 432 U.S. 282 (1977). In order for a reviewing court to examine a charge of pretrial publicity leading to jury bias, both the nature and extent of the publicity must be in the record. See Irvin, 366 U.S. at 724-28; United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1962), cert. denied, 372 U.S. 978 (1963). As noted by the Arkansas Supreme Court, petitioner never proffered any evidence of the specific types of publicity to which

the jurors were exposed. There is therefore nothing in the record to support petitioner's bare allegations of prejudicial publicity. There is also nothing in the voir dire of the three challenged jurors to indicate that related media coverage was anything other than factual, nor is there any reflection of hostility or animosity toward petitioner.

Petitioner also failed to elicit from the challenged jurors that any of them had a fixed opinion that he was guilty. On the contrary, each testified that he could set aside his impression or opinion and render a verdict based on the evidence presented in court. That is all that this Court requires under Murphy and Irvin.

Petitioner apparently advances the discounted theory that jurors should be totally ignorant of the facts and issues involved in his trial. That was declared to be an "impossible standard" by this Court in Irvin, 366 U.S. at 722.

The jurors who expressed any opinion with regard to the guilt of petitioner based those opinions on a previous finding by another jury that the petitioner was, in fact, guilty. That conclusion is the logical one to be drawn by anyone who believes in the American criminal justice system. Those who commented on it noted, however, that they were not familiar with the evidence presented to the other jury and would refrain from making any judgment until they heard the evidence presented in the instant trial. The trial court was able to judge the sincerity of the jurors' assurances. He did not abuse his discretion in refusing to excuse them for cause.

The petition for writ of certiorari should be denied because petitioner has failed to show that the selection process for his jury was tainted by prejudicial pretrial publicity. He has also failed to show that any juror seated held a fixed opinion of his guilt or was unwilling

or unable to set aside any prior impressions. Both the holding and reasoning of the Arkansas Supreme Court comport with prior decisions of this Court. There is thus no reason to grant certiorari.

## CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefor. Subsection (c) provides that such writs will be granted when a state court has decided a federal question in a way in conflict with applicable decisions of this Court or if it has decided an important federal question of federal law which has not been, but should be, settled by this Court.

Although respondent acknowledges that review on writ of certiorari is discretionary, and that the Court is not bound by the guidelines of Rule 17.1(c), it submits that the questions presented here were properly decided by the Arkansas Supreme Court. The Arkansas Court followed the decisions of this Court, and no important undecided questions of federal law are presented.

For these reasons and for the reasons and authorities cited in respondent's brief in opposition to the petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

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